No. 97-7541-CFY Title: Amanda Mitchell, Petitioner
v.
United States

Docketed: January 20, 1998 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Jan 13 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 15, 1998)
	Feb 2 1998	Waiver of right of respondent United States to respond filed.
	Feb 5 1998	DISTRIBUTED. February 20, 1998
	Feb 12 1998	Response requested.
	Mar 12 1998	Order extending time to file response to petition until April 15, 1998.
	Apr 13 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Apr 16 1998	Order further extending time to file response to petition until May 15, 1998.
	May 15 1998	Brief of respondent United States in opposition filed.
	May 27 1998	REDISTRIBUTED. June 11, 1998
	Jun 15 1998	Petition GRANTED. SET FOR ARGUMENT December 9, 1998. **********
	Jun 30 1998	Motion of petitioner for appointment of counsel filed.
	Jul 8 1998	DISTRIBUTED. September 28, 1998 (Page 38)
	Aug 13 1998	Joint appendix filed.
	Aug 14 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Aug 14 1998	Brief of petitioner Amanda Mitchell filed.
	Sep 15 1998	Order extending time to file brief of respondent on the merits until September 25, 1998.
	Sep 25 1998	Brief of respondent United States filed.
	Oct 5 1998	Motion for appointment of counsel GRANTED and it is ordered that Steven A. Morley, Esquire, of Philadelphia, Pennsylvania, is appointed to serve as counsel for the petitioner in this case.
	Oct 26 1998	Reply brief of petitioner Amanda Mitchell filed.
	Nov 2 1998	CIRCULATED.
	Nov 16 1998	Record filed.
	Dec 9 1998	ARGUED.
	Dec 14 1998	Record filed.

1pp

(2) 97-7541

APPEAL NO.

IN THE SUPREME COURT OF THE UNITED STATES

AMANDA MITCHELL,
PETITIONER

VS.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Court of Appeals No. 96-1605) Eastern District of Pennsylvania No. 94-159-14

PETITION FOR CERTIORARI

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CASELAW

I. QUESTIONS FOR REVIEW

A. Should this Court hear this case to determine whether the Third Circuit's opinion that a criminal defendant has no Fifth Amendment right to remain silent at sentencing, which is in apparent conflict with this Court's established precedent in Estelle v. Smith, 451 U.S. 454 (1981), was correctly decided?

B. Should this Court hear this case to resolve a conflict among the various circuit courts of appeal on the issue of whether a criminal defendant retains a Fifth Amendment right to remain silent at sentencing?

II. LIST OF PARTIES

The Petitioner, Amanda Mitchell and the United States, are the sole parties to this litigation.

III. OPINIONS IN THE COURT BELOW

The as yet unpublished opinion of the United States Court of Appeals for the Third Circuit, along with the order denying rehearing, is attached as an exhibit to this Petition.

IV. STATEMENT OF JURISDICTION

This case involves a criminal conviction affirmed by the United States Court of Appeals for the Third Circuit on September 9, 1997, and denying reargument on October 17, 1997, making this Petition timely when filed ninety days from the latter date, pursuant to Supreme Court Rule 1. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

V. STATUTORY AND CONSTITUTIONAL PROVISIONS

Fifth Amendment to U.S. Constitution:

> "[n]o person...shall be compelled in any criminal case to be a witness against himself."

VI. STATEMENT OF THE CASE

The petitioner, Amanda Mitchell, a forty-five year old mother and grandmother with no prior record was indicted along with twenty-two other individuals as part of a cocaine conspiracy in Allentown, PA from 1989 through March 1994. She was charged in count two with conspiracy to distribute five or more kilograms of cocaine in violation of 21 USC 846, and with three counts of distribution of cocaine within 1,000 feet of a school in violation of 21 USC 860(a) (counts 11, 21 and 28.).

On October 16, 1995, the appellant entered an open plea of guilty to all four counts in the indictment with which she was charged, but specifically reserved the question of her level of culpability for the quantity of cocaine distributed as an issue to be determined at sentencing. She was advised that her guilty plea to the counts charging her with distribution near a school carried a mandatory minimum of one year in prison. She was also advised that if the court found that she had distributed in excess of five kilograms of cocaine, she would be subject to a ten year mandatory minimum sentence.

At the sentencing hearing before Judge Cahn on July 2, 1996, the court heard testimony from three trial witnesses and incorporated their trial testimony, as well as that of a fourth witness. Based on this evidence, Judge Cahn determined that Ms. Mitchell was a regular distributor for the conspiracy from early

1992 through the early 1994. According to his calculation, she distributed in excess of thirteen kilograms yielding a sentencing guideline range between ninety-six and a hundred and twenty-one months incarceration. Due to the mandatory minimum for distributing in excess of five kilograms, the court imposed a sentence of one hundred and twenty months, or ten years in prison.

Four witnesses addressed the alleged involvement of Amanda Mitchell - Alvitta Mack, who did not testify at sentencing, but whose trial testimony was adopted - and Paul Belfield, Shannon Riley and Richard Thompson, who testified at sentencing and adopted trial testimony.

The only witness who gave precise measure of drug quantities was Alvitta Mack. From March 1992, until July 1993 she taped deliveries of cocaine to her as well as the activities of various co-defendants in the conspiracy under supervision of DEA. At trial she testified as to three deliveries involving Amanda Mitchell - April 9, 1992, August 12, 1992, November 11, 1992. These corresponded to the three substantive counts to which petitioner pled guilty and amounted to approximately two ounces of cocaine.

Paul Belfield testified at trial and sentencing that in late 1991 or early 1992, Amanda Mitchell would deliver .2 or.4 grams of cocaine to him at his home. His testimony placed Amanda

Mitchell's involvement in 1992, which was not disputed.

Shannon Riley testified at the sentencing hearing that she adopted her trial testimony in this case. Ms. Riley admitted in sentencing testimony that she never mentioned Amanda Mitchell as a worker for the leaders of the conspiracy during her proffers with the government. She mentioned Ms. Mitchell in her trial testimony, but in her sentencing hearing testimony stated that she did not know whether Amanda Mitchell was selling drugs or buying drugs on the occasions she saw her at the bar which was the locus of some of the drug operations.

The only witness who offered more specific testimony regarding drug quantities was Richard Thompson. At sentencing he stated that from April 1992 through May 1992, he worked with Amanda Mitchell and observed her two to three times per week receiving bags for distribution of 1.5 to two ounces per occasion. This meant she had responsibility for distributing three to six ounces of cocaine for the weeks that she worked. He further testified that she only worked for him one day between June and August of 1992, but between August 1992 and December 1993, she was a regular courier of cocaine. Finally, he testified for the first couple of months of 1994, she was a manager along with Kathy Hottenstein, who was acquitted by the jury at trial.

On cross-examination, Thompson admitted that between August

and December of 1992 he only heard from others that Amanda Mitchell was involved. In addition, Thompson's trial testimony contradicted his sentencing testimony. At trial, he stated that Ms. Mitchell made deliveries for him from June through August, 1992. At sentencing his testimony was that she worked for him on only one day during that time. Further, he never mentioned Ms. Mitchell's involvement after 1992 in his trial testimony or in any of his proffers to the government. At trial he stated, "Lori, Lulu and myself," made deliveries for Kathy Hottenstein in 1993. He did not mention Amanda Mitchell as one of the individuals making deliveries in 1993. In contrast, at sentencing, he testified that she was a regular courier throughout 1993 and a manager in early 1994.

Judge Cahn credited the longer period of time for Ms. Mitchell's involvement as set forth in Thompson's testimony (distributions in 1992, 1993 and 1994) and used that as a basis to calculate personal responsibility of Ms. Mitchell at "something over" thirteen kilograms, 3.3 kilograms in 1994, 5.6 kilograms in 1993 and 3.9 kilograms in 1992. Judge Cahn never explained why he was adopting the higher estimate from Thompson's testimony.

Judge Cahn inquired of Ms. Mitchell what her involvement in the drug distribution network was. She stated:

> My name is Amanda Mitchell. I know for a lon[illegible] time I used drugs. I did a lot of things I - to get drugs. I am thankful to be alive today, from getting away from drugs. I changed my whole life totally around, and I just got away from it. I got too involved with doing drugs, and as much drugs as I did, I couldn't have did all the other things. That's all I have to say.

Judge Cahn drew a negative inference from Ms. Mitchell's decision to invoke her Fifth Amendment right to remain silent. He stated that if he was incorrect in drawing such a negative inference against her right to invoke the Fifth Amendment, the Court of Appeals would remand the case for resentencing and he would take another look at the credibility of the witnesses who testified against her.

The Third Circuit affirmed the judgment of sentence in a written, published opinion on September 9, 1997. In its opinion, the Third Circuit held that Ms. Mitchell did not have a Fifth Amendment right to refuse to testify at her sentencing proceeding. On October 17, 1997, the Third Circuit denied the petition for rehearing and rehearing en banc, by a vote of eight to four.

VII. REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE THIRD CIRCUIT IGNORES SETTLED LAW OF THE UNITED STATES SUPREME COURT TO THE EFFECT THAT THE FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF APPLIES AT SENTENCING PROCEEDINGS.

1. Sentencing is Part of a "Criminal Case" and as Such All Constitutional Protections of a "Criminal Case" Apply With Full Force

The Fifth Amendment commands "[n]o person...shall be compelled in any criminal case to be a witness against himself."

The opinion of the Third Circuit wrongly decides a constitutional question of enormous institutional and jurisprudencial importance. Approximately ninety percent of criminal defendants plead guilty. Therefore, sentencing, is frequently of greater importance than the question of guilt or innocence.

There can be no question that sentencing is part of the "criminal case", as defined by the Fifth Amendment and therefore all constitutional guarantees attach. It is pellucid that "it is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings." Von Moltke v. Gillies, 332 U.S. 708, 722 (1948)(Black, J., plurality opinion) (emphasis added). The Third Circuit applied these precepts and found the Sixth Amendment right to counsel applies at sentencing. United States v. Salemo, 61 F.3d 214 (3d

Cir. 1995). In determining the application of the Ex Poste Facto clause to criminal proceedings, it is the long-standing jurisprudencial history of this Court that an increase in punishment violates the proscriptions of that clause in "penal" cases. Weaver v. Graham, 450 U.S. 24 (1981). Similarly, the Fifth Amendment right to be free from double jeopardy applies not only to being tried twice for the same offense, but also to being subjected to an increase in punishment. North Carolina v. Pearce, 395 U.S. 711 (1969).

The conclusion that the Third Circuit reached - that the Fifth Amendment right to protect self-incrimination does not apply at sentencing - flies in the face of the plain language of the Fifth Amendment and the reasoning of this Court. This constitutional provision prohibits testimonial compulsion "in any criminal case." The import of the Third Circuit decision in this case is to remove the sentencing proceeding from being part of a "criminal case". Since this Court as well as the courts of appeals have consistently applied constitutional protections of criminal cases at sentencing proceedings, the decision of the Third ircuit flatly contradicts established precedent.[1]

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[1] The Fifth Amendment privilege has generally been held to be available "until appeal is exhausted or until the time for appeal expires." 1 McCormick on Evidence §121, at 440 (4th Ed. J.W. Strong 1992). A judgment of conviction becomes final for Fifth Amendment purposes on the date direct appellate review is completed, including the time to seek certiorari to this Court.

That sentencing, and its concomitant right to remain silent pursuant to the Fifth Amendment, is part of a "criminal case" has been recognized by this Court in Estelle v. Smith, 451 U.S. 454 (1981). In that case, this Court considered statements made by an incarcerated defendant to a psychiatrist to be used at a penalty hearing following a conviction for first degree murder. In concluding that such statements were inadmissible under the Fifth Amendment in the absence of warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966), the court cautioned that the core of the Fifth Amendment right to protect against self-incrimination is:

> 'The availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites'... we can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned... Any effort by the State to compel respondent to testify against his will at the sentencing clearly would contravene the Fifth Amendment. (emphasis added)

451 U.S. at 462-63 (citations omitted). Indeed, at the oral argument in Estelle, the State conceded it could not compel the defendant's testimony at sentencing. Id., n.7. The core of the Fifth Amendment right to protect against self-incrimination involves the issue of burden of proof:

Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948, 953-4 (1994).

> ...The requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips. Culombe v. Connecticut, 367 U.S. 568, 581-2, 81 S.Ct. 1860, 1867, 6 L.Ed. 2d 1037 (1961) (emphasis added).

Id. at 461.

The Estelle Court did not hesitate to find that the Fifth Amendment was fully protective at sentencing. This Court continued the vitality of that decision in Pennsylvania v. Muniz, 496 U.S. 582 (1990), Powell v. Texas, 492 U.S. 680 (1989) and Satterwhite v. Texas, 486 U.S. 249 (1988). While each of these cases, including Estelle, involved the death penalty, this is no basis to limit the applicability of the Fifth Amendment protections. Certainly the gravity and importance of a death penalty case is reason to proceed with the utmost legal caution. However, that is not a reason to find that the constitutional right would apply only where the death penalty is at issue. To so hold would fly in the face of established legal principles.

Indeed, in Estelle, this Court made abundantly clear that the,

> ...availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protections is invoked, but upon the nature of the statement or admission and the exposure which it invites. In re Gault, 387 U.S. 1 (1967).

Id. at 463.

This Court's reliance upon Gault is significant. That case

upheld the invocation or constitutional rights of juveniles at adjudication proceedings. Gault and its application to adult cases establish without question that constitutional protections apply in the broad span of the criminal process - from the relative lenient treatment of juveniles to the ultimate implementation of the law's harshest penalty - death.

Therefore, to apply the Fifth Amendment at the guilt stage of proceedings and not at the sentencing, contravenes the fundamental application of this sacred constitutional provision and its established interpretation by this Court. The Third Circuit opinion flatly contradicts such precedent.

2. The Denial of the Right to Invoke the Fifth Amendment at Sentencing Implicates the Petitioner's Right to be Free From Increased Punishment as Well as the Possibility of Future Prosecutions

In Hoffman v. United States, 341 U.S. 479, (1951), the Supreme Court ruled that a court may not require a witness to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such a tendency to incriminate." 341 U.S. at 488. This Court held that the self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." Id. at 486. An adverse inference applied against the petitioner constitutes

compulsion to "be a witness against" herself. Griffin v. California, 380 U.S. 609 (1965).

The Third Circuit's decision in this case can produce a procedural nightmare at sentencing hearings. Under this decision, there is nothing to prevent a prosecutor from calling a defendant as a witness at his or her own sentencing. If the defendant fails to respond to questions, the defendant would then be subject to contempt. Sentencing would devolve into mini-trials over the proper application of the Fifth Amendment and the scope of the punishment to be meted out for the failure to testify.

The Fifth Amendment application at sentencing should protect against the possibility of an increase in sentence. It is clear that testimony at such a proceeding could lead to increased punishment, based upon the drug quantities distributed, increasing a defendant's role in the offense, or even being subject to an enhancement for obstruction of justice by refusing to testify when one does not have a legal right to do so. USSG §1B1.3; See, United States v. Watts, 529 U.S. -, 136 L.Ed.2d 554 (1997). Therefore, like the defendant in Estelle, who wished to avoid a harsher penalty (death), the defendant at a sentencing hearing has a palpable interest to protect by invoking the Fifth Amendment right to refuse to testify.

Assuming arguendo that the Fifth Amendment is not part of a

"criminal case", and therefore does not protect against statements made at the defendant's own sentencing, there is no question that the Fifth Amendment does protect against potential prosecution for other offenses. When a Fifth Amendment privilege is claimed, the court must consider, "the implications of the question, in the setting which is asked..." Malloy v. Hogan, 378 U.S. 1, 14 (1964). Only if no risk of incrimination is evident may the witness be called upon to put forward some reasonable basis for the fear of self-incrimination as a result of truthful, testimonial disclosures. The ultimate burden of persuasion with respect to the validity of the claim of the Fifth Amendment privilege rests with the party opposing the claim.

In spite of there being no obligation for the petitioner to set forth a basis for the invocation of the Fifth Amendment, its application is clear. She was convicted of conspiracy and three "schoolyard counts." 21 USC §846, 860. The questions to which she remained silent concern "relevant conduct" under USSG §1B1.3. To qualify as "relevant" an additional transaction had to consist of criminal conduct. Therefore, as of July 2, 1996, she risked the prosecution under 21 USC §841(a) for any drug transaction which occurred within the previous five years other than the three for which she had already been convicted. She would be subject to prosecution for such other substantive transaction under federal or state law, or both. Her conviction for

conspiracy would not prohibit such prosecutions since there is no double jeopardy bar to successive prosecutions for conspiracy and substantive crimes. United States v. Felix, -U.S.-, 112 S.Ct. 1377 (1992) and United States v. Dixon, -U.S.-, 113 S.Ct. 2849 (1993).

Any answer she gave about "relevant conduct" could also afford a "link in a chain" of evidence to convict, potentially, of RICO 18 U.S.C. §1962(c), continuing criminal enterprise - CCE - (21 U.S.C. §848), money laundering (18 U.S.C. §§1956-57), Travel Act violations (18 U.S.C. §1952), telephone counts (21 U.S.C. §843), tax evasion (26 U.S.C. §7201) and potentially other violations of the criminal law.

The possibility of incrimination on other charges satisfies the standard that a Fifth Amendment risk must be "real and appreciable". Marchetti v. United States, 390 U.S. 39, 48 (1968). The fact that there are no pending charges or investigations, or that a prosecutor has assured the defendant that he will not be charged is not sufficient to overcome a claim of privilege. Hoffman v. United States, 341 U.S. at 486.

The Third Circuit's decision in this matter runs afoul of this Court's pronouncements on the Fifth Amendment. It improperly permits the defendant to be the instrument of her own sentencing increase as well as subjects her to the potentiality of new prosecutions. It raises the specter of creating enormous

complications at sentencing on this collateral issue. For these reasons, this Court should hear this case and rectify the Third Circuit's decision which runs flatly and clearly counter to established precedent of this Court.

B. THE THIRD CIRCUIT DECISION HAS CREATED A SPLIT IN THE CIRCUITS IN THAT VIRTUALLY ALL OTHER CIRCUITS WHICH HAVE CONSIDERED THE APPLICATION OF THE FIFTH AMENDMENT AT SENTENCING HAVE FOUND THE INVOCATION OF THAT CONSTITUTIONAL PRIVILEGE PROPER

In reaching the conclusion that the Fifth Amendment does not apply to sentencing proceedings, the Third Circuit opinion examined the law from other jurisdictions and concluded that most of those cases, which appear to hold that the Fifth Amendment can be invoked as a protection for the defendant from being the instrument of his own sentence increase, really do so only because of the threat of further prosecution. The Third Circuit then concluded that since there was no prospect of further prosecution in this case - and since it held that risk of increased punishment is not a basis to invoke the Fifth Amendment - the opinions from other circuits were inapposite.[2]

In reality, the other jurisdictions which have considered this question clearly state that there are two separate grounds for the invocation of the Fifth Amendment at sentencing - (1) to protect against an increase of sentence, and (2) to protect against future prosecution. In United States v. Lugg, 892 F.2d 101, 103 (D.C. Cir. 1989) that Court clearly stated:

> The convicted but unsentenced defendant retains a legitimate protectable Fifth Amendment interest in not testifying as to incriminating matters that

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[2] Of course, as noted supra. petitioner is at risk for prosecution for substantive offenses.

could yet have an impact on his sentence. (emphasis added).

The First Circuit cited Lugg in United States v. Delacruz, 996 F.2d 1307, 1312-13 (1st Cir. 1993) with approval. The court noted that if the defendant in that case testified it could impair his prospects of being deemed a "minor participant" under the sentencing guidelines or might even establish him as a supervisor, yielding an increased sentence. Therefore, the First Circuit recognized, and held, that the invocation of the Fifth Amendment was proper because compelled testimony might increase the defendant's sentence. Similarly, United States v. Matthews, 997 F.2d 848, 851, n.4 (11th Cir. 1993) recognized that other circuits applied the Fifth Amendment at sentencing so as to protect the defendant from being the instrument of his own sentence enhancement.

In United States v. Bahadar, 954 F.2d 821, 824 (2d Cir. 1992), that Court stated:

> Since Ali had not been sentenced on the count to which he pled guilty (and was faced with two open counts, later dismissed by the government, any testimony which he gave at Bahadar's trial could have been used as the basis for an upward departure at sentencing (emphasis added).

In accord, Bank One of Cleveland v. Abbe, 916 F.2d 1067, 1075-76 (6th Cir. 1990), which agreed with other circuits that the Fifth Amendment right against self-incrimination continues in force at sentencing and United States v. Garcia, 78 F.3d 1457, 1463 (10th

Cir. 1996), which follows Lugg, supra.

These cases stand for the proposition that the right to be free from increased punishment is a valid invocation of the Fifth Amendment at sentencing. The fact that there are or may have been pending charges, or the prospect of future charges was a separate and independent reason to permit the invocation of the Fifth Amendment. In contrast, the Third Circuit takes a contrary view. In the instant case, that court held that there is no Fifth Amendment right to refuse to testify at sentencing for fear that such testimony could lead to a higher sentence. This is in stark contrast to virtually every other circuit which has considered this issue.

Therefore, this Court should hear this case and resolve this conflict in the circuits.

ORIGINAL

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
MAY 15 1998
CLERK

No. 97-7541

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

AMANDA MITCHELL, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to assert the Fifth Amendment privilege against compelled self-incrimination at the sentencing hearing on her cocaine distribution conspiracy conviction on the ground that she was still exposed to prosecution on other charges.

2. Whether, after pleading guilty to distributing cocaine but reserving the right to contest the amount of cocaine involved, petitioner had a Fifth Amendment privilege not to testify at sentencing about the amount of cocaine because that testimony might adversely affect her sentence.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-7541

AMANDA MITCHELL, Petitioner

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1-15) is reported at 122 F.3d 185.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1997. A petition for rehearing was denied on October 17, 1997. The petition for a writ of certiorari was filed on January 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted

on three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a), and one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to ten years' imprisonment, to be followed by six years' supervised release. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner and 22 other defendants were indicted for their roles in a cocaine distribution conspiracy that operated between 1989 and 1994 in Allentown, Pennsylvania. Petitioner was charged in Count 1 with conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, and in Counts 11, 21, and 28 with separate instances of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a). Pet. App. 2.

Petitioner pleaded guilty, without a plea agreement, to all four counts in which she was charged, but reserved the right to contest the quantity of cocaine attributable to her on the conspiracy count. 10/16/95 Tr. 7. The court advised petitioner that the quantity determination would be made following a sentencing hearing (ibid.), and that her guilty plea exposed her to substantial punishment "depending on the quantity involved" (id. at 12). The court and the prosecutor informed petitioner of the penalties for her offenses (id. at 6-14, 24), including the ten-year mandatory minimum sentence under 21 U.S.C. 841 for distribution of at least five kilograms, but less than 15 kilograms, of cocaine (id. at 6-8, 12). The court also explained

to petitioner that she would waive various rights by pleading guilty, including her Fifth Amendment right not to testify. Id. at 14-16. The court stated in that respect that "[y]ou have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy." Id. at 16.

Nine of petitioner's co-defendants went to trial. Much of the trial testimony centered on the activities of Harry Riddick, the alleged leader of the cocaine distribution ring. Three of the original co-defendants, who had pleaded guilty and agreed to cooperate with the government, testified that petitioner was one of Riddick's regular sellers. Shannon Riley testified that she had often seen petitioner at Phill's Bar and Grill, the headquarters of the cocaine distribution ring, going into the bathrooms to sell cocaine. Paul Belfield testified that, when he was selling cocaine for Riddick in 1991 and 1992, petitioner delivered the cocaine to him. Richard Thompson testified that petitioner sold one-and-a-half ounces of cocaine to customers two or three times a week from April 1992 through December 1993. Pet. App. 4-5.

At petitioner's sentencing hearing, those witnesses adopted their trial testimony. In addition, Thompson testified that, between April 1992 and August 1992, petitioner had worked two or three times a week, selling one-and-a-half to two ounces of cocaine each time. He also testified that, between August 1992 and December 1993, petitioner had worked three to five times a week. And he testified that petitioner was one of those in charge of

cocaine distribution from January 1994 through March 1994. The government also proffered the trial testimony of Alvitta Mack, who stated that, in 1992, she had received three deliveries of cocaine, totaling two ounces, from petitioner. Pet. App. 5.

Petitioner did not offer any evidence at the sentencing hearing and did not testify to rebut the government's evidence about drug quantity. Rather, petitioner, through counsel, argued that the testimony regarding her three small sales to Mack was the only evidence sufficiently reliable to be credited in determining the quantity of cocaine attributable to her for sentencing purposes. Pet. App. 5.

The district court rejected petitioner's arguments. The court found that the testimony identifying petitioner as a drug courier on a regular basis over an extended period was credible and that her sales of one-and-a-half to two ounces of cocaine twice a week for a year and a half put her "well over five kilograms." Pet. App. 6; 7/2/96 Tr. 57. The court stated that "[o]ne of the things" that persuaded it to credit the testimony of Riley, Belfield, and Thompson was petitioner's "not testifying to the contrary." Pet. App. 6; 7/2/96 Tr. 61; see also Pet. App. 7; 7/2/96 Tr. 65 (advising petitioner that "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times"). The court reasoned that petitioner had no Fifth Amendment right not to have her silence at the sentencing hearing considered against her, because "once a criminal defendant in a felony charge pleads guilty, then that defendant * * * no longer

has a Fifth Amendment right to remain silent." Pet. App. 6; 7/2/96 Tr. 60. The court explained to petitioner that "without anything from you and with my understanding of the Riddick cocaine organization, I think you were involved in more than five kilograms of cocaine." 7/2/96 Tr. 66.

The court then made a finding that petitioner had participated in the distribution of almost 13 kilograms of cocaine during the conspiracy. Pet. App. 7; 7/2/96 Tr. 66. The court accordingly imposed a sentence of ten years' imprisonment -- the minimum term applicable when the quantity of cocaine involved is five kilograms or more. Pet. App. 7; see 21 U.S.C. 841(b)(1)(A)(ii).

2. The court of appeals affirmed. The court rejected petitioner's claim that the district court erred in considering her failure to testify at the sentencing hearing. Pet. App. 7-13. The court observed that, "if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege." Id. at 8 (citing Ullmann v. United States, 350 U.S. 422, 431 (1956)). The court also noted that a defendant who has pleaded guilty to an offense "waives his privilege as to the acts constituting it" once he has been advised by the trial court of the rights that he relinquishes by such a plea, and that petitioner did not dispute that she had been fully advised of the consequences of her guilty plea, including her relinquishment of her Fifth Amendment right to remain silent. Pet. App. 8. Nor did petitioner contend that her plea was not knowing and intelligent. Ibid.

The court of appeals acknowledged the general principle that a defendant's plea of guilty to one offense does not waive the Fifth Amendment privilege with respect to other offenses. Pet. App. 10. The court reasoned, however, that the Fifth Amendment's directive that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" does not "extend[] to testimony that would have an impact on the appropriate sentence for the crime of conviction." Id. at 12. The court noted that petitioner "does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense, see 18 Pa. C.S.A. § 111." Ibid.; see also id. at 13 (observing that petitioner "does not claim that she exposed herself to future federal or state prosecution").[1] And the court concluded that the amount of cocaine involved in petitioner's distribution conspiracy offense, while affecting the severity of her sentence, "is not an issue of independent criminality to which the Fifth Amendment applies." Id. at 12.[2]

The court of appeals noted that decisions from other circuits had allowed a witness to assert the Fifth Amendment privilege after

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[1] The Pennsylvania statute cited by the court of appeals bars, with certain exceptions not applicable here, a state prosecution following a federal conviction based on the same conduct.

[2] The court of appeals found that petitioner's reservation of the issue of drug quantity at the time of her plea did not compel a different result. The court explained that, "[w]hile [petitioner's] reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." Pet. App. 12.

a guilty plea. The court also noted, however, that "in most instances * * * the witness would have been at risk of prosecution on other offenses." Pet. App. 11. The court rejected those courts' suggestion that an individual could assert the Fifth Amendment privilege solely because his testimony could be used to enhance his sentence. Id. at 11.

The court of appeals also rejected petitioner's claim that the evidence was insufficient to support the district court's finding that she had distributed nearly 13 kilograms of cocaine. The court observed that the district court had found credible the testimony of four witnesses that petitioner sold cocaine on a regular basis, including Thompson's testimony that petitioner sold one-and-a-half to two ounces of cocaine on two to five days per week between April 1992 and March 1994. In addition, the court noted that the district court could infer that those amounts were reliable from petitioner's refusal to offer any evidence to the contrary. Pet. App. 13-14.

Judge Michel, in a concurring opinion, agreed with the majority that "ordinarily a guilty plea waives the privilege as to all facts concerning the transactions alleged in an indictment," but he questioned whether that rule applied in this case given petitioner's reservation of the quantity issue at the time of her guilty plea. But Judge Michel deemed it unnecessary to resolve that issue. He concluded that any error in that regard was harmless because "the evidence amply supported [the district

court's] finding on quantity," apart from petitioner's silence. Pet. App. 15.

ARGUMENT

Petitioner contends that the district court violated her Fifth Amendment privilege against compelled self-incrimination by adversely considering her refusal to testify at the sentencing hearing about the quantity of drugs involved in the cocaine distribution conspiracy offense to which she had pleaded guilty. That claim does not warrant further review.

1. Although petitioner now claims (Pet. 14-15) that she retained a Fifth Amendment privilege at sentencing because her testimony could have subjected her to additional federal and state drug charges, she did not present that claim to the district court or the court of appeals. Indeed, the court of appeals expressly noted petitioner's failure to make such a claim, stating that she "does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense." Pet. App. 13. The court therefore did not address the question whether petitioner had a Fifth Amendment privilege to avoid giving testimony that could subject her to further criminal prosecution. Instead, the court addressed only whether petitioner retained a Fifth Amendment privilege after her guilty plea with respect to testimony that might affect her sentence for the offense to which she had pleaded guilty.

Because petitioner's claim that her testimony could have been used against her in additional prosecutions was not raised below or addressed by the court of appeals, that claim is not properly presented to this Court. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Indeed, if the court of appeals had been presented with a credible claim that petitioner's testimony at sentencing would have subjected her to further criminal charges, the court presumably would have held, in accordance with its own precedents, that petitioner had a Fifth Amendment right to refuse to testify. See Pet. App. 10 (recognizing that "a defendant's plea of guilty to one offense does not 'by its own force . . . waive a privilege with respect to other alleged transgressions'") (quoting United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978)).

2. Petitioner also contends (Pet. 8-13, 17-19) that she retained a Fifth Amendment privilege even after her guilty plea with respect to testimony that might adversely affect her sentence, and that the district court therefore erred in considering her failure to testify at the sentencing hearing concerning the quantity of drugs involved in the cocaine distribution conspiracy offense.

The court of appeals correctly held that, "by voluntarily and knowingly pleading guilty to the offense, [petitioner] waived her Fifth Amendment privilege" with respect to the acts constituting that offense for all further proceedings in the case. Pet. App. 8.

"A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination," McCarthy v. United States, 394 U.S. 459, 466 (1969), and consequently has "[n]o Fifth Amendment privilege" to "refus[e] to provide information on the count to which he had admitted his guilt," United States v. Trujillo, 906 F.2d 1456, 1461 (10th Cir. 1990), cert. denied, 498 U.S. 962 (1990). See United States v. Rodriguez, 706 F.2d 31, 36 (2d Cir. 1983) (a defendant's guilty plea waives the Fifth Amendment privilege "with respect to the crime to which the guilty plea pertains," so that "if such crime is the only one for which the defendant is potentially liable, he can be forced to testify") (quoting Yurasovich, 580 F.2d at 1218); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982) ("[a] voluntary guilty plea * * * is a waiver of the fifth amendment privilege * * * in regard to the crime that is admitted").

The defendant's waiver of the privilege is reflected in Federal Rule of Criminal Procedure 11, which governs a district court's acceptance of a defendant's plea of guilty. In order to accept a guilty plea, the court must be satisfied that "there is a factual basis for the plea," which the court may ascertain by "question[ing] the defendant under oath * * * about the offenses to which the defendant has pleaded." Fed. R. Crim. P. 11 (c)(5), (f). It would make no sense to conclude that the defendant's waiver of the Fifth Amendment privilege, while applicable at the change of plea proceeding if the defendant is questioned about the offense to

which he has pleaded guilty, ceases to be applicable at sentencing if the defendant is asked to supply additional details about that offense. See Rogers v. United States, 340 U.S. 367, 373 (1951) ("Disclosure of a fact waives the privilege as to details.").[3]

Petitioner's assertion that the decision below conflicts with Estelle v. Smith, 451 U.S. 454 (1981), is incorrect. That case involved the prosecution's use of the defendant's statements during at a court-ordered pretrial psychiatric evaluation to prove the defendant's future dangerousness in the sentencing phase of a capital murder trial. The Court held that the admission of those compelled and "unwarned" statements at sentencing violated the defendant's Fifth Amendment privilege, rejecting the State's argument that the privilege did not apply because the defendant's guilt had already been adjudicated. Id. at 463; see id. at 462-463 ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). The defendant in Estelle v. Smith, unlike petitioner here, had not pleaded guilty and thereby waived his Fifth Amendment privilege. See id. at 457 (noting that defendant had been convicted of murder by a jury). The Court's decision does not, therefore, address

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[3] Petitioner's reservation of the drug quantity issue for determination at the sentencing hearing does not alter the effect of her guilty plea as a waiver of the Fifth Amendment privilege. As the court of appeals held, "[w]hile her reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." Pet. App. 12.

whether the privilege continues in effect following a plea of guilty, particularly in a non-capital sentencing proceeding.[4]

3. Petitioner also contends (Pet. 17-19) that the decision below conflicts with decisions of other circuits that permitted an individual who has pleaded guilty to an offense to assert the Fifth Amendment privilege to avoid giving testimony that could adversely affect his sentence.

a. The only case cited by petitioner that involves analogous circumstances is United States v. Garcia, 78 F.3d 1457 (10th Cir.), cert. denied, 116 S. Ct. 1888 (1996), where a defendant who had pleaded guilty challenged the district court's adverse consideration of his failure to testify at sentencing. The court of appeals, while stating that a defendant's Fifth Amendment privilege "continues during sentencing even where the defendant has pled guilty to a crime," id. at 1463, ultimately ruled against the defendant and affirmed the sentence imposed. It concluded that the district court's consideration of the defendant's failure to testify was harmless error in light of the evidence supporting the sentencing findings. Id. at 1464-1465. There is thus no conflict between the outcomes of this case and Garcia.[5]

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[4] In reaching its decision that the Fifth Amendment applied at the capital sentencing phase in Estelle v. Smith, the Court recognized "[t]he gravity of the decision to be made at the penalty phase" in such cases, and concluded that the Fifth Amendment protects a criminal defendant "from being made the 'deluded instrument' of his own execution." 451 U.S. at 462.

[5] Garcia also failed to cite the Tenth Circuit's earlier decision in Trujillo, supra, which is consistent with this case both in rationale and result. In Trujillo, a defendant refused, in a presentence interview with a probation officer, to make a

b. The remaining cases cited by petitioner involved individuals who pleaded guilty and then invoked the Fifth Amendment privilege to refuse to testify at the trial of a co-defendant or in another separate proceeding. Unlike this case, they did not involve a defendant who pleaded guilty, refused to testify at her own sentencing hearing, and then had the court draw adverse inferences from her silence in imposing her sentence.[6] "It is settled that a waiver of the Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs." United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); see In re Morganroth, 718 F.2d 161,

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statement about the offense to which he had pleaded guilty, and the probation officer consequently recommended that the defendant not receive a reduction in offense level for acceptance of responsibility. The district court accepted the probation officer's recommendation, and the court of appeals affirmed, rejecting the defendant's argument that the Fifth Amendment prevented the district court from adversely considering his silence at the presentence interview. The court of appeals explained that "[n]o Fifth Amendment privilege exists" where a defendant, after pleading guilty, "was refusing to provide information on the count to which he had admitted his guilt." 906 F.2d at 1461. The court also held that a sentence reduction is not, in any event, a "penalty" for purposes of the Fifth Amendment. Ibid.

[6] This Court has ruled that the Fifth Amendment protects a defendant from having his silence considered against him at the guilt phase of his criminal trial, Griffin v. California, 380 U.S. 609 (1965), but has not addressed whether Griffin also applies at the sentencing phase. In other contexts outside the guilt phase of a criminal trial, the Court has ruled that, even where the Fifth Amendment privilege prevents compelling an individual to testify against himself, the privilege permits drawing adverse inferences from the individual's refusal to testify. See Baxter v. Palmigiano, 425 U.S. 308, 316-318 (1976) (state prison disciplinary hearing). Accordingly, even if the district court could not have compelled petitioner to testify about the details of her crime, the court still might have been permitted to draw an adverse inference from petitioner's refusal to testify.

165 (6th Cir. 1983) (noting the "majority rule that the privilege is 'proceeding specific' and not waived in a subsequent proceeding by waiver in an earlier one") (citing cases); cf. Ellis v. United States, 416 F.2d 791, 800 (D.C. Cir. 1969) (an individual who testifies before a grand jury without invoking the Fifth Amendment privilege thereby waives the privilege if called as a witness at a trial based on an indictment returned by the grand jury). Accordingly, although a defendant waives the privilege with respect to his own criminal case when he enters a guilty plea, he does not necessarily waive the privilege with respect to separate proceedings against other persons. United States v. Johnson, 488 F.2d 1206, 1210 (1st Cir. 1973).

In addition, as the court below recognized (Pet. App. 10-11), most of the assertedly conflicting cases cited by petitioner appear to have involved prospective witnesses with valid Fifth Amendment claims based upon their exposure to prosecution for other offenses. It was not essential to the outcomes of those cases whether the prospective witness could invoke the Fifth Amendment solely to avoid giving testimony that could increase the severity of his sentence. See, e.g., United States v. Mathews, 997 F.2d 848, 851 n.4 (11th Cir.) (stating that a "convicted, but not yet sentenced, defendant risks * * * additional prosecutions for related conduct"), cert. denied, 510 U.S. 1029 (1993); United States v. Bahadar, 954 F.2d 821, 824 (2d Cir.) (noting that co-defendant's testimony could have been used as the basis for an upward departure at sentencing or "as evidence to support a prosecution on the two

open counts" still pending against him), cert. denied, 506 U.S. 850 (1992); Bank One of Cleveland v. Abbe, 916 F.2d 1067, 1075 (6th Cir. 1990) (stating that witnesses' "Fifth Amendment rights did survive their nolo plea as to the bank fraud charges because they remained vulnerable to further federal and state prosecution").[7]

Petitioner suggests (Pet. 17 n.2) that the existence of additional potential charges does not distinguish the cases from other circuits, because she is also "at risk for prosecution for substantive offenses." As previously noted, however, petitioner did not raise that claim below. The court of appeals expressly decided this case on the assumption that petitioner's testimony would not subject her to prosecution for other offenses. Pet. App. 13. As this Court has recognized, "[t]he validity of [a witness's] justification [for the privilege] depends, not upon claims that would have been warranted by the facts shown, but upon the claim

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[7] See also Garcia, 78 F.3d at 1457 (stating that defendant's testimony after a guilty plea "could have subjected him to further criminal liability," which the court suggested would include, but not necessarily be limited to, the enhancement of his sentence); United States v. De La Cruz, 996 F.2d 1307, 1313 (1st Cir.) (noting that witness's testimony could have inculpated him in "other drug transactions"), cert. denied, 510 U.S. 936 (1993).

The D.C. Circuit has suggested that exposure to prosecution on other offenses is not necessary to support the privilege. See United States v. Lugg, 892 F.2d 101, 103 (D.C. Cir. 1989) (holding that defendants who pleaded guilty could assert privilege to avoid testifying at co-defendants' trial solely to avoid sentence enhancement). We also note that some cases not cited by petitioner allowed an individual who had pleaded guilty but had not been sentenced to assert the privilege at a co-defendant's trial, without indicating whether the individual remained at risk of prosecution on other charges. See, e.g., Lema v. United States, 987 F.2d 48, 55 n.7 (1st Cir. 1993); United States v. Hernandez, 962 F.2d 1152, 1161 (5th Cir. 1992).

that actually was made." United States v. Murdock, 284 U.S. 141, 148 (1931), overruled on other grounds, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

c. Finally, review is not warranted here for two additional reasons. As the decided cases indicate, an individual who has pleaded guilty, but is awaiting sentencing, will usually be able to assert the Fifth Amendment privilege based on a fear of prosecution for other related offenses. Accordingly, the question whether the privilege may be invoked even absent such a fear does not arise with any frequency.

In addition, even if petitioner were held to have a Fifth Amendment privilege to refuse to testify at her sentencing hearing, the outcome of this case would almost certainly be the same. As noted by Judge Michel's concurrence, the case "could be disposed of under the Harmless Error rule," because the evidence amply supports the district court's finding on the quantity of cocaine involved in petitioner's offense, wholly apart from any reliance on her silence. Pet. App. 15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1998

No. 97-7541

APR 13 1998

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

AMANDA MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner pleaded guilty to a non-capital offense. At sentencing, the court imposed a ten-year mandatory minimum term expressly predicated on the adverse inference it drew from her silence with respect to the quantity of drugs "involved" in her conspiracy offense.

Does the Fifth Amendment privilege protect the defendant from an adverse inference being drawn on the basis of her silence at sentencing?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Amanda Mitchell's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. At the request of the Court, the Solicitor General has been invited, notwithstanding the government's waiver of answer, to respond to the petition. Both petitioner and respondent have granted amicus NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL), is a District of Columbia nonprofit corporation founded 40 years ago, numbering more than 9000 attorneys, including citizens of every state. The NACDL has over 70 state and local affiliates with a combined membership of some 28,000.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission.

NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the defense of the Fifth Amendment privilege against compulsory self-incrimination, as one of the constitutional provisions which is least understood and appreciated by public opinion, yet which is of the highest value in the preservation of a free society which respects the dignity and autonomy of every individual, including the criminally accused and suspected.

SUMMARY OF ARGUMENT

A criminal defendant who has pleaded guilty retains the right to assert the Fifth Amendment privilege against being compelled to be a witness against herself at sentencing. The Third Circuit erred in affirming an increased sentence that was expressly predicated on drawing an adverse inference from the defendant-petitioner's silence.

The clause applies by its terms to petitioner's failure to deny an allegation of the amount "involv[ed]" under the federal mandatory minimum sentencing law for controlled substance conspiracies. Sentencing occurs "in a criminal case," and when the court draws an adverse inference from silence, it is imposing compulsion "to be a witness."

Information that increases a defendant's sentence is used "against" her. The Amendment itself does not demand that there also be any risk of "self-incrimination" on the substance of the charges.

Even if the Fifth Amendment privilege protects only against a real and substantial risk of self-incrimination, the privilege was not inapplicable on the basis that petitioner had pleaded guilty. She had not waived her right to appeal, and at sentencing her conviction was not yet final. Her answers to the judge's questions could also have incriminated her on several criminal charges beyond those to which she had pleaded guilty.

The circuits are divided on the applicability of the Fifth Amendment privilege in these circumstances, and the decision below is inconsistent with this Court's cases. The petition for certiorari should be granted; the judgment below must be reversed.

REASONS FOR GRANTING THE WRIT

The question presented is of exceptional importance in the administration of federal criminal justice, and the Third Circuit's opinion is inconsistent with this Court's precedent and decisions of other circuits.

Petitioner Mitchell pleaded guilty to all counts against her in the indictment but asserted a right not to provide information that could subject her to increased punishment in either this case or in another, later prosecution. The sentencing court held that this refusal warranted an adverse inference that tipped the balance to satisfy the government's burden of establishing that the extent of her conduct created liability for a conspiracy "involving" more than five kilograms of cocaine, resulting in the imposition

of a mandatory minimum ten year term. 21 U.S.C. § 841(b)(1)(A). The Third Circuit affirmed on the basis that the Fifth Amendment's privilege against compulsory self-incrimination does not apply at sentencing following a guilty plea. Pet. Appx.; 122 F.3d 185. This Court should grant review and reverse that judgment and opinion.

The decision of the court below erroneously resolves a constitutional question of major institutional significance. Over 90% of federal criminal defendants whose cases are not dismissed plead guilty. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1996*, at 448 (24th ed., U.S. Dept. of Justice, 1997) (table 5.27).[2] In the vast majority of federal cases, sentencing is the most important issue. Conduct for which the defendant has not been convicted can add years to her punishment in the most routine of cases. USSG § 1B1.3 ("relevant conduct" rule); see United States v. Watts, 529 U.S. --, 136 L.Ed.2d 554 (1997) (per curiam); United States v. Witte, 515 U.S. 389 (1995). Here, it resulted in the imposition of a mandatory minimum ten year term. Because the "Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,'" Estelle v. Smith, 451 U.S. 454, 468 (1981) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)), the defendant must have a right to remain silent without penalty at sentencing.

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[2] Of 60,255 total federal defendants in 1996, 7083 had their cases dismissed. Of the remaining 53,172 defendants, 48,196 (90.6%) pleaded guilty or nolo contendere. Thus, in total, 80% of cases ended in guilty pleas (48,196/60,255); of all those convicted, 92% were convicted by plea. Id.

In Estelle v. Smith, this Court considered statement made during a court-ordered competency evaluation. Th psychiatrist's observations were later used in support of th state's claim for a death penalty. This Court held the statements inadmissible under the Fifth Amendment in the absence of the warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966). Smith, 451 U.S. at 461-69.[3]

The majority of this Court in Smith reaffirmed its long-held position:

> that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'

451 U.S. at 462-63 (citations omitted).[4] Nothing in the Court's rationale suggests any basis to limit that decision

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[3] The Court also held that the Sixth Amendment required in this context that defense counsel be notified in advance of the planned interview. 451 U.S. at 469-72. Then-Justice Rehnquist concurred in the judgment on Sixth Amendment grounds but disagreed with respect to the applicability of the Fifth Amendment to punishment issues. 451 U.S. at 747-76. No other Justice joined in that position, which the court below effectively adopted, albeit without even citing Estelle v. Smith.

[4] The Court reserved decision on the question whether, in other contexts, Miranda warnings are always required when a convicted defendant is interviewed in custody to obtain information for sentencing. Smith, 451 U.S. at 469 n.13. In that reservation, the Court did not intimate doubt about the applicability vel non of the Fifth

to capital proceedings, nor does anything in the text or the purpose of the Fifth Amendment's self-incrimination clause. Cf. Delo v. Lashley, 507 U.S. 272, 286 n.7 (1993); Gardner v. Florida, 430 U.S. 349, 357-60 (1977) (plurality). See also Roberts v. United States, 445 U.S. 552, 559-61 (1980) (rejecting claim that defendant could remain silent at sentencing without penalty on sole basis that constitutional privilege was not contemporaneously invoked; no Justice suggested Fifth Amendment was inapplicable).

The question presented in this case is worthy of consideration by this Court on certiorari. The application of the Fifth Amendment privilege at non-capital sentencings was presented for consideration in a case granted review for decision in the 1992 Term, only to have the writ dismissed after argument as improvidently granted. See Montana v. Imlay, 506 U.S. 5 (1992) (per curiam).[5] Justice White urged the Court to take a federal case presenting another manifestation of the issue for consideration that year. See Kinder v. United States, 504 U.S. 946 (1992) (opinion dissenting from denial of certiorari).[6]

Commentators immediately noticed that the Third Circuit's opinion in this case:

> marked a dramatic departure from the overwhelming weight of case law. Every other circuit that has ruled on this issue has decided that a defendant retains her Fifth Amendment privilege if her testimony could be used to increase her sentence.

Recent Cases, 111 Harv.L.Rev. 1140, 1142 (1998) (noting and sharply criticizing decision below).[7] Concurring in the judgment, Judge Michel, sitting by designation, recognized that the decision in this case "create[s] an apparent split among Circuits." 122 F.3d at 192. Judges Becker, Scirica, Mansmann and Nygaard voted for rehearing in banc. Pet. Appx.

Not only is petitioner Mitchell's Fifth Amendment claim important and her position consistent with precedent, but it is also supported by the language and principles of the Fifth Amendment privilege against compul-

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(footnote continued)

Amendment privilege at the sentencing stage of a "criminal case"; the concern was with such Miranda-related matters as "custody" and "interrogation."

[5] In Imlay, the Court was set to decide "whether the Fifth Amendment bars a State from conditioning probation upon the probationer's successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts." 506 U.S. 5 (White, J., dissenting).

[6] The question presented in Kinder was whether the "acceptance of responsibility" sentencing guideline, USSG § 3E1.1, violated the Fifth Amendment privilege, to the extent that (prior to amendment in 1992) it required the defendant to acknowledge guilt for "relevant conduct" beyond the offense of conviction. USSG appx. C, amend. 459.

[7] The Harvard Note counts seven circuits to the contrary of the court below, along with "[m]ost state courts." 111 Harv.L.Rev. at 1142-43 n.32.

sory self-incrimination.[8] For these reasons, the writ should be granted.

1. The Plain Language of the Fifth Amendment Applies Between Conviction and Sentencing Without Regard to the Risk of Incrimination for Other Offenses.

The Fifth Amendment protects every "person" against being "compelled in any criminal case to be a witness against himself." If the defendant must choose between testifying and facing greater punishment, there is Fifth Amendment compulsion. The court below professed that it could "see nothing in the Fifth Amendment ... that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction." 122 F.3d at 191. But under the plain language of the amendment, "self-incrimination" is not the sole test. To the contrary, that phrase does not

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[8] Although this case arises out of a federal criminal prosecution, it does not seem possible for this Court to avoid the constitutional question on statutory grounds. The question whether the defendant may, without adverse inference, remain silent at sentencing is not addressed in Fed.R.Crim.P. 32 or in the United States Sentencing Guidelines' procedural provisions (see USSG ch. 6.A.), nor is it addressed by 18 U.S.C. § 3481 ("In trial of all persons charged with the commission of offenses against the United States ..., the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.") (emphasis added); see generally Bruno v. United States, 308 U.S. 287 (1939).

even appear in the Clause itself; it is shorthand for an extension of the Amendment's literal protection. The core guarantee of the Fifth Amendment privilege is against being compelled "in a criminal case" to "be a witness against" oneself. Counselman v. Hitchcock, 142 U.S. at 562.

Sentencing surely occurs "in" the "criminal case," and the adverse inference applied against petitioner Mitchell compelled her to "be a witness against" herself at that proceeding. See Griffin v. California, 380 U.S. 609 (1965); see also James v. Kentucky, 466 U.S. 341, 344 (1984) ("to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so"); Carter v. Kentucky, 450 U.S. 288 (1981). Sentencing judges, like juries, are bound to reject the unconstitutional inference.

Under the Third Circuit's holding there is nothing to stop a prosecutor from calling the defendant to the witness stand at sentencing and moving for contempt if she refuses to answer punishment-enhancing questions, or even of calling the defendant before a grand jury after conviction and prior to sentencing. Such possibilities are inconsistent with the constitutional privilege. See Sara S. Beale, Wm. C. Bryson, et al., 1 Grand Jury Law and Practice § 6:10, at 6-80 (2d ed. 1997) (citing 3 circuits and 6 states); Grand Jury Project, 1 Representation of Witnesses Before Federal Grand Juries § 8.5(e), at 8-19 (3d ed. R.J. Klieman rev. 1998).

The decision below would also compel a defendant's response to every inquiry of a U.S. Probation Officer in the presentence investigation, since there would be no privilege to withhold sentence-increasing

responses. Compare Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982) (Fifth Amendment applies to presentence investigation interview of detained convict)[9]; accord, United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting), cert. denied, 498 U.S. 1094 (1991); cf. United States v. Cortes, 922 F.2d 123, 126 (2d Cir. 1990) (rationale of contrary cases not "altogether persuasive").

The broader protection against "self-incrimination" that courts have fashioned to enforce the Fifth Amendment privilege explains why the right can also be invoked in any case, civil or criminal, when the potentially incriminating answers could be used against the witness in a future criminal case. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).[10] But in the criminal case itself, the defendant cannot even be called to the stand by the prosecutor, regardless of the nature of the questions to be asked, without literally violating the privilege against being made "a witness against himself" that applies "in a criminal case."[11] That core protection -- the right of a criminal defendant to remain entirely silent and entirely absent from the witness stand in his or her own case -- is ignored by the decision below.

2. A Guilty-Pleading Defendant Is Not Differently Situated from a Defendant Who Has Gone to Trial with Respect to Fifth Amendment Rights at Sentencing.

The right of any person to claim the Fifth Amendment privilege with respect to the instant offense should be held to apply until the "criminal case" terminates, that is, when the conviction becomes final. Thus, at least

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[9] Without deciding the Miranda issue, id. at 757 n.2, the Jones court granted habeas relief to a defendant who had been ordered by the court to attend, cooperate and follow instructions in the presentence interview.

[10] See also Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976) (Fifth Amendment claim available to prisoner in disciplinary proceeding, but adverse inference may be drawn); Garner v. United States, 424 U.S. 648, 658 (1976) (privilege may be claimed in response to question on tax return, but is waived if not invoked); United States v. Kordel, 397 U.S. 1 (1970) (available to civil litigant responding to interrogatories, but must be invoked); Arndstein v. McCarthy, 254 U.S. 71 (1920) (available to debtor in bankruptcy; dismissal of imprisoned contemnor's habeas corpus petition reversed), clarified on denial of mtn. for interv. & rearg., 254 U.S. 379 (1920).

[11] By its text, the Fifth Amendment privilege against being compelled to be a witness against oneself "in any criminal case" applies fully at sentencing, regardless of whether the convicted defendant is then still an "accused" facing a "criminal prosecution" under the Sixth Amendment. Cf. Williams v. New York, 337 U.S. 241 (1949) (due process clause does not require confrontation of witnesses, so as to preclude use of hearsay brought in through probation report at capital sentencing). This Court's most recent Fifth Amendment pronouncement does not bolster the holding of the court below. Ohio Adult Parole Auth. v. Woodard, 1998 U.S.Lexis 2130 (March 25, 1998) (No. 96-1769), involved a clemency application -- a nonjudicial, post-conviction process that is presumably no longer "in [the] criminal case." There, the Court permitted an adverse inference from the applicant's refusal to be interviewed. Cf. Baxter v. Palmigiano, supra.

while the right of direct appeal remains available, the privilege survives.[12] The leading treatises agree. E.g., 1 McCormick on Evidence § 121, at 440 (4th ed. J.W. Strong 1992); see also Annot. (Soeffing), "Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question," 9 A.L.R.3d 990 (1966 & 1996 Supp.). Under the Fifth Amendment, a defendant who has pleaded guilty but has not yet been sentenced is not situated any differently from one who has stood trial and may appeal for a retrial.

The court below cited Reina v. United States, 364 U.S. 507, 513 (1960), see 122 F.3d at 189, but that case is entirely inapposite. The petitioner there refused to testify before a grand jury after he had been convicted and sentenced, and had begun to serve the term imposed. The Court held his refusal to answer questions about his offense could be valid in relation to potential state charges, but that this risk had been removed by a grant of immunity.

Even when the defendant has pleaded guilty, as here, a right of appeal remains, which may sometimes lead to a trial. If the defendant has not moved to withdraw her plea before sentencing under Fed.R. Crim.P. 32(e), from which denial an appeal could arise, she may nevertheless appeal on the basis of substantial defects in the Rule 11 colloquy, see McCarthy v. United States, 394 U.S. 459 (1969), or to challenge the factual basis for the plea, see North Carolina v. Alford, 400 U.S. 25 (1970), or to claim a breach of a plea agreement. See Santobello v. New York, 404 U.S. 257 (1971). Any of these appeals may lead to vacatur of the plea and a trial on the underlying charge. Until the appeal terminates or the time to take a direct appeal expires, the defendant must be permitted to remain silent with respect to the underlying charges in the case.

The Fifth Amendment privilege is not forfeited, as to all matters related to the crime of conviction, by the mere fact of the plea itself. A "waiver" of the privilege by testifying on a certain subject is binding only during the same "proceeding," meaning that particular stage of the case. See Annot. (DiSabatino), "Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings," 42 A.L.R.Fed. 793 (1979). See generally Brown v. United States, 356 U.S. 148 (1958) (defendant may not testify in own defense but decline to be cross-

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[12] A judgment of conviction "becomes final" on the date that direct appellate review, including certiorari to this Court, is completed, or the time to seek that review expires. See Caspari v. Bohlen, 510 U.S. 383, 390-91 (1994); Graham v. Collins, 506 U.S. 461, 467-68 (1993); Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986) (per curiam). And even if a line could be drawn earlier than the termination of the appellate process, it should at least be clear that during the sentencing proceedings, a conviction, whether by plea or verdict, is not final. Indeed, it could be argued that a risk of self-incrimination exists until the conviction is beyond conventional challenge. Cf. 28 U.S.C. § 2255 (one-year statute of limitations after finality to bring motion to vacate).

examined in reliance on Fifth Amendment).[13]

When the courts say that a defendant waives his or her rights under the Fifth Amendment by pleading guilty, they mean only that the defendant may choose not to plead guilty, and instead may stand on the right to remain silent and put the government to its proof of the elements; in other words, that the defendant may refuse to change her plea. See, e.g., Parke v. Raley, 506 U.S. 20 (1992); Boykin v. Alabama, 395 U.S. 238 (1969). That dictum does not mean that the guilty-pleading defendant no longer has any Fifth Amendment rights in relation to the general subject matter of the offenses of conviction. Nor does it mean that at a later stage, such as sentencing, the waiver implicit in the change of plea itself still obtains. See Recent Cases, 111 Harv.L.Rev. at 1143-44.

The use of an adverse inference to tip the balance against petitioner in the computation of drug quantities necessary to trigger a mandatory-minimum sentence (or to establish "relevant conduct" justifying an increased guideline sentence) was unconstitutional.

3. Petitioner, Like Virtually Every Federal Defendant, Risked Self-Incrimination at Sentencing on Numerous Other Offenses.

Apart from the validity of petitioner Mitchell's claim of a Fifth Amendment privilege at sentencing with respect to the offense of conviction, her claim should have been sustained in view of the sundry other crimes for which she could still be prosecuted. The court below was mistaken in distinguishing this case from others on the basis that "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." 122 F.3d at 191. She had no burden to make that claim. Whenever the risk of self-incrimination is apparent, a court must sustain the privilege claim. Malloy v. Hogan, 378 U.S. 1, 14 (1964), quoting Hoffman v. United States, 341 U.S. 479, 486 (1951).

In Hoffman, this Court ruled that a witness may not be required to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." 341 U.S. at 488. The self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." Id. at 486. The decision below ignored the established precept that while the debtor or witness bears the burden of claiming the privilege, only in the atypical situation where it is not evident from the questions and their context where the potential for self-incrimination may lie should the court demand that the witness proffer the basis for the constitutional claim.[14] Even then, under Hoffman, the claimant does not bear the ultimate burden of establishing the claim of privilege.

Here, the basis for petitioner's claim, as to additional offenses, was perfectly evident. Her penalized

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[13] In addition, "[d]isclosure of a fact waives the privilege as to details." Rogers v. United States, 340 U.S. 367, 373 (1951).

[14] Only a mere unexplained statement that the information sought would or could tend to incriminate the witness may be held insufficient. Hoffman, supra.

silence concerned drug transactions deemed "relevant conduct" under USSG § 1B1.3. To qualify as "relevant" (at least in the Third Circuit) any additional transaction had to consist of criminal conduct. United States v. Dickler, 64 F.3d 818, 830-31 (3d Cir. 1995). In this case particularly, where the petitioner had pleaded "open" to all counts and there was no plea agreement, the government was free, if it wished, to prosecute her further for any number of other offenses, including particular transactions in furtherance of the same conspiracy that were the very basis for the "relevant conduct" determination.[15] As petitioner cogently explains, Pet. at 14-15, at the time of her sentencing, in July 1996, she faced a "real and appreciable" risk[16] of further prosecution on many state or federal charges that might occur to an imaginative prosecutor wandering the pages of our over-criminalized statute books. Indeed, if she has no Fifth Amendment right to remain silent, the government might even choose to seek additional charges in response to a defendant's refusal to provide information between plea and sentencing about her own conduct and that of others. Compare Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978), with Blackledge v. Perry, 417 U.S. 21 (1974).

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[15] These transactions were also expressly treated as "involv[ed]" in her instant conspiracy offense so as to trigger a mandatory ten-year term under 21 U.S.C. § 841(b)(1)(A)(ii)(II).

[16] Marchetti v. United States, 390 U.S. 39, 48 (1968), quoting Brown v. Walker, 161 U.S. 591, 599 (1896) (in turn quoting British case law).

If a court is convinced that a question cannot possibly involve self-incrimination, the witness can be compelled to testify. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972).[17] On the other hand, neither the absence of a current investigation or charge, nor informal assurances of police or prosecutorial authorities concerning a lack of present intention to prosecute, will suffice to overcome a claim of privilege; it is enough that the defendant have reasonable cause to apprehend danger of prosecution as a result of the disclosures. Hoffman, 341 U.S. at 486. The casual dismissal of petitioner's claim by the court below stands in stark contrast to this Court's standard.[18]

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[17] For example, the statute of limitations may have run on that offense, or the claimant may already enjoy double jeopardy protection from prosecution, or the claim may involve potential incrimination under the laws of a foreign jurisdiction with which there is no extradition treaty. See Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1065-66 (3d Cir.) (hypothetical possibility of extrajudicial kidnaping insufficient), aff'd on other grnds., 493 U.S. 400 (1990). In Zicarelli, the Court found that although the witness might reasonably fear a foreign prosecution generally, there was no logical connection between that risk and the questions he had refused to answer in New Jersey. See United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), cert. granted, 118 S.Ct. 751 (1998) (No. 97-873).

[18] In none of this Court's cases is the existence of a current criminal investigation said to be a requirement for a Fifth Amendment claim. In fact, the cases say the opposite. See, e.g., Minnesota v. Murphy, 465 U.S. 420,

For all these reasons, as well as those discussed in the petition itself,[19] the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, to address the important question presented, to resolve a split in the Circuits, and to correct manifest constitutional error, this Court should grant the writ of certiorari. After full briefing and argument, this Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to allow petitioner a resentencing.

Respectfully submitted,

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Dated: April 10, 1998

_____(footnote continued)

435 (1984) ("answers that would incriminate him in a pending or later criminal prosecution") (emphasis added); Maness v. Meyers, 341 U.S. 479, 462 (1975).

[19] Amici specifically commends to this Court's attention the petitioner's demonstration of a split in the circuits on the issue presented here. Petition, at 17-19; see also note 7 supra.

(5)

No. 97-7541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMANDA MITCHELL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 13, 1998
CERTIORARI GRANTED JUNE 15, 1998

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DOCKET ENTRIES

DATE	PROCEEDINGS
8/12/94	Superseding Indictment returned as to Amanda Mitchell and others docketed at 94-CR-159-14 (Eastern District of Pennsylvania)
9/19/94	Arraignment—plea of not guilty entered to Counts 2/11/21 and 28.
10/16/95	Amanda Mitchell pleads guilty to Counts 2/11/21 and 28.
7/2/96	Amanda Mitchell sentenced to one 120 months in prison, supervised release of six years and special assessment of $200.00.
7/11/96	Notice of appeal filed to the Third Circuit Court of Appeals.
7/17/97	Oral argument before the Third Circuit on the issues of the right to invoke the Fifth Amendment at sentencing and the foreseeability of the drug quantities attributable to Amanda Mitchell for sentencing purposes.
9/9/97	Published opinion filed with Chief Judge Sloviter writing for herself and Judge Roth and Circuit Judge Paul Michel concurring.
10/7/97	Petitioner's application for a rehearing in banc.
10/17/97	Order denying rehearing and rehearing in banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 94-159-S

UNITED STATES OF AMERICA

v.

HARRY LEE RIDDICK, JR., PHILL GROSS, FRANK ALEXANDER, CRAIG ALTON RIDDICK, HILARION TORRUELLA, JR. a/k/a "Johnny," SHANNON RILEY, PAUL BELFIELD, BETH ANN STOCKE, SYLVESTER THOMAS, a/k/a "Sly," RICHARD THOMPSON, KATHY HOTTENSTEIN, LORI HOTTENSTEIN, JAMES ADAMS, AMANDA MITCHELL, a/k/a "Amanda Foster," HANNEL JAMES, a/k/a "Tony," GLENDLY SERGEANT, a/k/a "Courtney," BRENDA INABINETT, BIENVENIDO PEREZ, MICHAEL PLETZ, RODERICK BRANTLEY, a/k/a "Chunk," CLARA SMITH, RUSSELL HOLMES, and MELVIN HOLLOWAY

Violation: 21 U.S.C. § 846, (1 Count),
21 U.S.C. § 848, (1 Count),
21 U.S.C. § 860(a), (31 Counts),
21 U.S.C. § 841(a)(1), (13 Counts,
18 U.S.C. § 2 (30 Counts),
21 U.S.C. § 853 (2 Counts)

SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

From in or about 1989 to in or about March of 1994, at Lehigh and Northampton Counties in the Eastern District of Pennsylvania and elsewhere, the defendant,

HARRY LEE RIDDICK, JR.

knowingly and intentionally did engage in a continuing criminal enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1), 846, and 860(a), as set forth in Counts 2, 8-13, 15, 18, 19, 21, 22, 28, 33, and 34 of this Superseding Indictment, and did commit other violations of those same statutes which were part of a continuing series of violations of those same statutes undertaken by the defendant in concert with at least five other persons with respect to whom HARRY LEE RIDDICK, JR., occupied a position of organizer, supervisor, and manager, and from which continuing series of violations defendant HARRY LEE RIDDICK, JR., obtained substantial income and resources.

In violation of Title 21, United States Code, Section 848(a).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

From in or about 1989 to in or about March of 1994, in Lehigh and Northampton Counties, in the Eastern District of Pennsylvania, and elsewhere, the defendants,

HARRY LEE RIDDICK, JR.,
PHILL GROSS,
FRANK ALEXANDER,
CRAIG ALTON RIDDICK,
HILARION TORRUELLAS, JR.,
a/k/a "Johnny,"
SHANNON RILEY,
PAUL BELFIELD,
BETH ANN STOCKE,
SYLVESTER THOMAS,
a/k/a "Sly,"
RICHARD THOMPSON,
KATHY HOTTENSTEIN,
LORI HOTTENSTEIN,
JAMES ADAMS,

AMANDA MITCHELL,
a/k/a "Amanda Foster,"
HANNEL JAMES,
a/k/a "Tony,"
GLENDLY SERGEANT,
a/k/a "Courtney,"
BRENDA INABINETT,
RUSSELL HOLMES,
MELVIN HOLLOWAY,
CLARA SMITH
BIENVENIDO PEREZ,
MICHAEL PLETZ, and
RODERICK BRANTLEY,
a/k/a "Chunk,"

did knowingly and wilfully combine, conspire, confederate and agree together and with other persons known and unknown to the Grand Jury, to distribute more than five kilograms of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

MANNER AND MEANS

1. It was part of the conspiracy that the defendants HARRY LEE RIDDICK, JR., PHILL GROSS, FRANK ALEXANDER, CRAIG ALTON RIDDICK, SHANNON RILEY, HILARION TORRUELLAS, JR., a/k/a "Johnny," would and did purchase kilogram quantities of cocaine from sources in New York City and elsewhere for distribution in Lehigh and Northampton Counties.

2. It was further part of the conspiracy that the defendants HARRY LEE RIDDICK, JR., CRAIG ALTON RIDDICK, HILARION TORRUELLAS, JR., a/k/a "Johnny," and SHANNON RILEY, would and did at various times set the price of cocaine to be sold to customers.

3. It was further part of the conspiracy that the defendants and others known and unknown to the Grand

Jury would and did distribute quantities of cocaine to customers.

4. It was further part of the conspiracy that the defendants would and did act in different roles and would and did perform different tasks at different times.

5. It was further part of the conspiracy that the defendant PHILL GROSS would and did sell cocaine in and outside the premises of Phill's Bar & Grill, 349 Hanover Avenue, Allentown, Pennsylvania, and would and did at various times allow HARRY LEE RIDDICK, JR., and associates of HARRY LEE RIDDICK, JR., including but not limited to CRAIG ALTON RIDDICK, SHANNON RILEY, SYLVESTER THOMAS, PAUL BELFIELD, BETH ANN STOCKE, RICHARD THOMPSON, RUSSELL HOLMES, and MELVIN HOLLOWAY to use Phill's Bar and Grill, 349 Hanover Avenue, Allentown, as a place in which to sell cocaine and to contact customers to schedule cocaine sales. PHILL GROSS would and did discourage others not associated with HARRY LEE RIDDICK, JR., from selling cocaine in and outside Phill's Bar and Grill, in order to guarantee HARRY LEE RIDDICK, JR., and his associates the exclusive opportunity to provide cocaine to customers on those premises.

6. It was further part of the conspiracy that the defendant, HARRY LEE RIDDICK, JR., would and did provide vehicles to couriers to facilitate their delivery of cocaine to customers at his direction.

7. It was further part of the conspiracy that the defendant HARRY LEE RIDDICK, JR., would and did carry firearms in vehicles used by him in order to protect quantities of cocaine and the proceeds of cocaine distribution, and to facilitate the distribution of cocaine.

8. It was further part of the conspiracy that the defendants would and did use digital and voice pagers to communicate with cocaine suppliers and customers and to

set up cocaine sales. The defendant HARRY LEE RIDDICK, JR., supplied pagers to couriers to facilitate the delivery of cocaine to customers. The defendants assigned numerical identifier codes to each other and to suppliers and customers, which those individuals used when paging the defendants to order or offer quantities of cocaine.

9. It was further part of the conspiracy that HARRY LEE RIDDICK, JR., would attempt to use his acquaintances within a certain law enforcement agency to determine whether the defendants and their associates were under investigation and in order to protect the defendants' cocaine trafficking operation.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed by defendants in the Eastern District of Pennsylvania and elsewhere:

1. On or about May 17, 1991, at Phill's Bar & Grill, 349 Hanover Avenue, Allentown, PHILL GROSS sold a quantity of cocaine to a person known to the Grand Jury.

2. On or about June 7, 1991, at Phill's Bar & Grill, 349 Hanover Avenue, Allentown, PHILL GROSS sold a quantity of cocaine to a person known to the Grand Jury.

3. On or about June 15, 1991, at Phill's Bar & Grill, 349 Hanover Avenue, Allentown, PHILL GROSS sold a quantity of cocaine to a person known to the Grand Jury.

4. On or about June 21, 1991, at Phill's Bar & Grill, 349 Hanover Avenue, Allentown, PHILL GROSS sold a quantity of cocaine to a person known to the Grand Jury.

5. On or about June 28, 1991, at Phill's Bar & Grill, 349 Hanover Avenue, Allentown, PHILL GROSS sold a quantity of cocaine to a person known to the Grand Jury.

6. On or about March 10, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a

quantity of cocaine to a person known to the Grand Jury, with the assistance of SYLVESTER THOMAS, a/k/a "Sly".

7. On or about March 12, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of SYLVESTER THOMAS, a/k/a "Sly," and RICHARD THOMPSON.

8. On or about March 26, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of RICHARD THOMPSON.

9. On or about April 9, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of JAMES ADAMS, RICHARD THOMPSON, and AMANDA MITCHELL, a/k/a "Amanda Foster."

10. On or about April 15, 1992, at 112 South Sixth Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of SYLVESTER THOMAS, a/k/a "Sly," and several other persons known to the Grand Jury.

11. On or about April 29, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of RICHARD THOMPSON.

12. On or about May 15, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury.

13. On or about May 27, 1992, at 747 Greenleaf Street, Allentown, CRAIG ALTON RIDDICK sold a

quantity of cocaine to a person known to the Grand Jury.

14. On or about June 2, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury with the assistance of SLYVESTER THOMAS, a/k/a "Sly."

15. On or about June 11, 1992, at 747 Greenleaf Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

16. On or about June 26, 1992, at 747 Greenleaf Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

17. On or about July 12, 1992, SYLVESTER THOMAS, a/k/a "Sly," brought a quantity of cocaine to 847 Jackson Street, Allentown, on the instructions of HARRY LEE RIDDICK, JR., in order to sell some or all of it to a person known to the Grand Jury.

18. On or about July 17, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury with the assistance of SYLVESTER THOMAS, JR.

19. On or about July 17, 1992, at 747 Greenleaf Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

20. On or about August 12, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury with the assistance of AMANDA MITCHELL, a/k/a "Amanda Foster."

21. On or about September 4, 1992, at 747 Greenleaf Street, Allentown, HARRY LEE RIDDICK, JR., sold a

quantity of cocaine to a person known to the Grand Jury with the assistance of JAMES ADAMS.

22. On or about September 8, 1992, at 8 Catasauqua Road, Whitehall, LORI HOTTENSTEIN sold a quantity of cocaine to a person known to the Grand Jury.

23. On or about September 14, 1992, at 8 Catasauqua Road, Whitehall, LORI HOTTENSTEIN sold a quantity of cocaine to a person known to the Grand Jury.

24. On or about September 25, 1992, at 8 Catasauqua Road, Whitehall, LORI HOTTENSTEIN sold a quantity of cocaine to a person known to the Grand Jury.

25. On or about September 28, 1992, at 8 Catasauqua Road, Whitehall, LORI HOTTENSTEIN sold a quantity of cocaine to a person known to the Grand Jury.

26. On or about October 20, 1992, at 747 Greenleaf Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

27. On or about November 11, 1992, at 322 North Thirteenth Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury with the assistance of AMANDA MITCHELL, a/k/a "Amanda Foster."

28. On or about November 13, 1992, at 322 North Thirteenth Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

29. On or about January 15, 1993, at 322 North Thirteenth Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

30. On or about January 26, 1993, at 322 North Thirteenth Street, Allentown, CRAIG ALTON RIDDICK

sold a quantity of cocaine to a person known to the Grand Jury.

31. On or about February 9, 1993, at 322 North Thirteenth Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

32. On or about February 17, 1993, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury with the assistance of MELVIN HOLLOWAY.

33. On or about March 2, 1993, at 322 North Thirteenth Street, Allentown, HARRY LEE RIDDICK, JR., sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of PAUL BELFIELD.

34. On or about March 4, 1993, at 322 North Thirteenth Street, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

35. On or about March 10, 1993, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, PAUL BELFIELD sold a quantity of cocaine to a person known to the Grand Jury.

36. On or about March 16, 1993, at 322 North Thirteenth Street, Allentown, PAUL BELFIELD sold a quantity of cocaine to a person known to the Grand Jury.

37. On or about April 16, 1993, at Fifth and Allen Streets, Allentown, CRAIG ALTON RIDDICK sold a quantity of cocaine to a person known to the Grand Jury.

38. On or about April 21, 1993, at 311 North Eighth Street, Allentown, FRANK ALEXANDER sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of BRENDA INABINETT.

39. On or about April 29, 1993, at 322 North Thirteenth Street, Allentown, PAUL BELFIELD sold a quantity of cocaine to a person known to the Grand Jury.

40. On or about May 13, 1993, at 311 North Eighth Street, Allentown, HANNEL JAMES, a/k/a "Tony," sold a quantity of cocaine to a person known to the Grand Jury, on the instructions of FRANK ALEXANDER, and with the assistance of BRENDA INABINETT.

41. On or about May 17, 1993, at 311 North Eighth Street, Allentown, HANNEL JAMES, a/k/a "Tony," sold a quantity of cocaine to a person known to the Grand Jury, on the instructions of FRANK ALEXANDER, and with the assistance of BRENDA INABINETT.

42. On or about May 20, 1993, at 311 North Eighth Street, Allentown, BRENDA INABINETT spoke to HANNEL JAMES, a/k/a "Tony," about selling a quantity of cocaine to a person known to the Grand Jury.

43. On or about May 20, 1993, at 311 North Eighth Street, Allentown, GLENDLY SERGEANT sold a quantity of cocaine to a person known to the Grand Jury, with the assistance of BRENDA INABINETT.

44. On or about June 2, 1993, in the vicinity of Phill's Bar and Grill, 349 Hanover Avenue, Allentown, RUSSELL HOLMES and SYLVESTER THOMAS, a/k/a "Sly," sold a quantity of cocaine to a person known to the Grand Jury.

In violation of Title 21, United States Code, Section 846.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 17, 1991, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PHILL GROSS,

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 7, 1991, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PHILL GROSS,

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 15, 1991, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PHILL GROSS,

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 21, 1991, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PHILL GROSS,

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 28, 1991, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PHILL GROSS,

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 10, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
SYLVESTER THOMAS, a/k/a "Sly,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 12, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR.,
SYLVESTER THOMAS, a/k/a "Sly,"
and RICHARD THOMPSON,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 28.1 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 26, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
SYLVESTER THOMAS, a/k/a "Sly,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 28.1 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 9, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., JAMES ADAMS,
RICHARD THOMPSON, and
AMANDA MITCHELL, a/k/a "Amanda Foster,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 29.4 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 29, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR.,
and RICHARD THOMPSON,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 28.0 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 15, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendant.

HARRY LEE RIDDICK, JR.,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 30.8 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 27, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 1.322 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 2, 1992 at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
SYLVESTER THOMAS,
a/k/a, "Sly,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 28.8 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 11, 1992, at Fifth and Washington Streets, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 12.6 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the playground at Sixth and Tilghman Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 26, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 13.8 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 12, 1992, at 847 Jackson Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

HARRY LEE RIDDICK, JR.,

did knowingly and intentionally possess with intent to distribute, and aid and abet and cause the possession with

intent to distribute, approximately 58.78 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the playground at Ninth and Jackson Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 17, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
SYLVESTER THOMAS, a/k/a "Sly,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 14.3 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 17, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 15.1 grams of a substance containing a detectable amount of cocaine, a Sched-

ule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, Ninth and Cedar Streets, Allentown.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 12, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY L. RIDDICK, JR. and
AMANDA MITCHELL, a/k/a "Amanda Foster,"

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 14.0 grams of a substace containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, a public elementary school at Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about Steptember 4, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY L. RIDDICK, JR.,
and JAMES ADAMS

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, 12.9 grams of a sub-

stance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, a public elementary school at Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 8, 1992, at 8 Catasauqua Road, Whitehall, in the Eastern District of Pennsylvania, the defendant,

LORI HOTTENSTEIN

did knowingly and intentionally distribute 0.231 gram of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 14, 1992, at 8 Catasauqua Road, Whitehall, in the Eastern District of Pennsylvania, the defendant,

LORI HOTTENSTEIN

did knowingly and intentionally distribute approximately 0.238 gram of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 25, 1992, at 8 Catasauqua Road, Whitehall, in the Eastern District of Pennsylvania, the defendant,

LORI HOTTENSTEIN

did knowingly and intentionally distribute approximately 0.208 gram of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 28, 1992, at 8 Catasauqua Road, Whitehall, in the Eastern District of Pennsylvania, the defendant,

LORI HOTTENSTEIN

did knowingly and intentionally distribute approximately 3.25 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 20, 1992, at 747 Greenleaf Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute, and aid and abet and cause the distribution of 13.5 grams of a substance containing a detectable amount of cocaine, a

Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Washington Elementary School, a public elementary school at Ninth and Cedar Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 11, 1992, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
AMANDA MITCHELL, a/k/a "Amanda Foster,"

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, 14.1 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 13, 1992, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute 13.7 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one

thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 15, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute 13.9 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 26, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute 26.0 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 9, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute 27.6 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 17, 1993, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR. and
MELVIN HOLLOWAY,

did knowingly and intentionally distribute, and aid and abet and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT THIRY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 2, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

HARRY LEE RIDDICK, JR., and
PAUL BELFIELD

did knowingly and intentionally distribute 27.7 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 4, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute 26.7 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 10, 1993, at Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendant,

PAUL BELFIELD

did knowingly and intentionally distribute, and aid and abet and cause the distribution of 14.1 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT THIRTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 16, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

PAUL BELFIELD

did knowingly and intentionally distribute 27.2 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 13, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

PAUL BELFIELD

did knowingly and intentionally distribute approximately 25.7 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT THIRTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 16, 1993, at Fifth and Allen Streets, Allentown, in the Eastern District of Pennsylvania, the defendant,

CRAIG ALTON RIDDICK

did knowingly and intentionally distribute approximately 27.8 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the playground at Sixth and Tilghman Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT FORTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 21, 1993, at 311 North Eighth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

FRANK ALEXANDER and
BRENDA INABINETT

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance

containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Central Elementary School, a public elementary school at Chew and Lumber Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FORTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 29, 1993, at 322 North Thirteenth Street, Allentown, in the Eastern District of Pennsylvania, the defendant,

PAUL BELFIELD

did knowingly and intentionally distribute approximately 51.1 grams of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Franklin Playground, a playground at Fourteenth and Emmett Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a).

COUNT FORTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 13, 1993, at 311 North Eighth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

FRANK ALEXANDER, BRENDA INABINETT,
and HANNEL JAMES, a/k/a "Tony,"

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of

the real property comprising the Central Elementary School, a public elementary school at Chew and Lumber Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FORTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 17, 1993, at 311 North Eighth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

FRANK ALEXANDER, BRENDA INABINETT, and HANNEL JAMES, a/k/a "Tony,"

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Central Elementary School, a public elementary school at Chew and Lumber Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FORTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 20, 1993, at 311 North Eighth Street, Allentown, in the Eastern District of Pennsylvania, the defendants,

FRANK ALEXANDER, BRENDA INABINETT, HANNEL JAMES, a/k/a "Tony," and GLENDLY SERGEANT, a/k/a "Courtney,"

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance

containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, within one thousand feet of the real property comprising the Central Elementary School, a public elementary school at Chew and Lumber Streets, Allentown, Pennsylvania.

In violation of Title 21, United States Code, Section 860(a), and Title 18, United States Code, Section 2.

COUNT FORTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 2, 1993, in the vicinity of Phill's Bar and Grill, 349 Hanover Avenue, Allentown, in the Eastern District of Pennsylvania, the defendants,

RUSSELL HOLMES, and SYLVESTER THOMAS, a/k/a "Sly,"

did knowingly and intentionally distribute, and aid, abet, and cause the distribution of, a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT FORTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 11, 1994, at 2603 Lafayette Avenue, Bethlehem, in the Eastern District of Pennsylvania,

SHANNON RILEY

did knowingly and intentionally possess with intent to distribute a quantity of a substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FORTY-SEVEN
(CRIMINAL FORFEITURE)

THE GRAND JURY FURTHER CHARGES THAT:

1. The defendant HARRY LEE RIDDICK, JR. has committed violations of Title 21, United States Code, Sections 841(a)(1), 846, 848(a) and 860(a), as alleged in Counts One, Two, 8-13, 15, 18, 19, 21, 22, 28, 33, and 34 of this Superseding Indictment, which counts are realleged and incorporated by reference, and all of which violations are punishable by imprisonment for more than one year.

2. As the result of the foregoing violations of Subchapter I of the Controlled Substances Act, defendant HARRY LEE RIDDICK, JR. shall forfeit to the United States of America:

(A) any and all property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of such violations of Subchapter I of the Controlled Substances Act;

(B) any and all property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violations of Subchapter I of the Controlled Substances Act; and

(C) any interest in, claims against, and property and contractual rights affording a source of influence over, the continuing criminal enterprise.

3. Any other property of the defendant up to the value of the assets and property described above shall be forfeited if any asset or property, as the result of any act or omission of the defendant: (a) cannot be located upon the exercise of due diligence; (b) has been transferred, sold to, or deposited with a third party; (c) has been placed beyond the jurisdiction of the court; (d) has been substantially diminished in value; and (e) has been commingled with other property which cannot be divided without difficulty.

In violation of Title 21, United States Code, Sections 841(a)(1) Section 846, 848, 860 and 853.

COUNT FORTY-EIGHT
(CRIMINAL FORFEITURE)

THE GRAND JURY FURTHER CHARGES THAT:

1. From in or about 1989 through in or about March of 1994, in the Eastern District of Pennsylvania and elsewhere, defendant PHILL GROSS did knowingly and intentionally violate Subchapter I of the Controlled Substances Act, Title 21, United States Code, Section 841(a)(1) and Section 846, as alleged in Counts Two through Seven of this Superseding Indictment, which counts are realleged and incorporated by reference, and which violations are punishable by imprisonment for more than one year.

2. As the result of the foregoing violations of Subchapter I of the Controlled Substances Act, defendant PHILL GROSS shall forfeit to the United States of America:

(A) any and all property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of such violations of Subchapter I of the Controlled Substances Act; and

(B) any and all property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violations of Subchapter I of the Controlled Substances Act.

3. Any other property of the defendant up to the value of the assets and property described above shall be forfeited if any asset or property, as the result of any act or omission of the defendant: (a) cannot be located upon the exercise of due diligence; (b) has been trans-

ferred, sold to, or deposited with a third party; (c) has been placed beyond the jurisdiction of the court; (d) has been substantially diminished in value; and (e) has been commingled with other property which cannot be divided without difficulty.

In violation of Title 21, United States Code, Section 841(a)(1) Section 846 and Section 853.

Grand Jury Foreman

/s/ Michael R. Stiles
MICHAEL R. STILES
United States Attorney
Eastern District of Pennsylvania

Date: 8/12/94

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted in Printing]

CHANGE OF PLEA HEARING
BEFORE THE HONORABLE EDWARD N. CAHN
UNITED STATES DISTRICT JUDGE

[2] (The following was heard in open court at 10:05 o'clock a.m.)

THE COURT: Okay. All right. We're ready to take pleas with Amanda Mitchell and Sylvester Thomas. Can we do this en masse or do you want to take the pleas separately?

MS. MILLER: I believe separately, your Honor.

THE COURT: Okay. Which do you want to take first?

MS. MILLER: Perhaps Amanda—Amanda Mitchell, your Honor.

THE COURT: All right. Would Amanda Mitchell and her attorney come forward please?

MR. MORLEY: Good morning, your Honor.

THE COURT: Good morning.

(Pause in proceedings.)

THE COURT: Miss Mitchell, my name is Judge Cahn, and I've been assigned to be the Judge for your case.

Your attorney advises me that you wish to change your plea from not guilty to guilty.

THE DEFENDANT: Yes.

THE COURT: Before I can accept that plea, we need to have a discussion to make sure that you understand your rights and that you understand the facts and

that you understand the range of punishment to which you could be subjected if you plead guilty.

What is your name?

[3] THE DEFENDANT: Amanda Mitchell.

THE COURT: How old are you?

THE DEFENDANT: 44.

THE COURT: How far did you go in school?

THE DEFENDANT: Finished twelfth.

THE COURT: Are you working now?

THE DEFENDANT: Yes, I am.

THE COURT: By whom are you employed?

THE DEFENDANT: Jumundi (ph) Foundation.

THE COURT: Are you married?

THE DEFENDANT: Yes.

THE COURT: Are you living with your—with your husband?

THE DEFENDANT: Yes.

THE COURT: Do you have any children?

THE DEFENDANT: Two.

THE COURT: How old?

THE DEFENDANT: 21 and 18.

THE COURT: They're both adults?

THE DEFENDANT: Yes, and a grandbaby.

THE COURT: Now, I'm going to place you under oath, and you'll be required to answer my questions truthfully or you could be charged with perjury or false swearing.

Don't be concerned about being honest with us because if you decide to have your trial instead of pleading [4] guilty, you—anything you say here cannot be used against you.

Kris, would you place Miss Mitchell under oath?

AMANDA MITCHELL, Defendant, Sworn.

AUDIO OPERATOR: Please spell and state your name for the record.

THE DEFENDANT: A-M-A-N-D-A, M-I-T-C-H-E-L-L, Amanda Mitchell.

THE COURT: Are you under the influence of any medicine this morning?

THE DEFENDANT: No.

THE COURT: Have you taken any alcohol in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Are you under the influence of any drugs or controlled substances this morning?

THE DEFENDANT: No.

THE COURT: Have you ever had any psychiatric treatment?

THE DEFENDANT: No.

THE COURT: What is the state of your health today?

THE DEFENDANT: Fair.

THE COURT: Any problems that I ought to know about that affect the way you could think or anything like that?

THE DEFENDANT: No.

[5] THE COURT: Are you satisfied with Mr. Morley?

THE DEFENDANT: Yes.

THE COURT: Has he met with you and explained the law to you?

THE DEFENDANT: Yes.

THE COURT: Have you met with him and explained the facts to him as you know them?

THE DEFENDANT: Yes.

THE COURT: Now, you've been indicted by the Grand Jury—and would you tell us what counts she's charged in, Ms. Miller?

MS. MILLER: Yes, sir. with the Court's indulgence. May I approach the podium, your Honor?

THE COURT: You may.

MS. MILLER: Miss Mitchell is charged in Count 2 of Indictment 94-159 with conspiracy to distribute more than five kilograms of cocaine; in Count 11, with the distributing and aiding and abetting the distribution of cocaine within a thousand feet of an elementary school; in Count 21—the Court's indulgence—with distributing and aiding and abetting the distribution of cocaine within a thousand feet of the same elementary school; and in

Count 28, with distributing and aiding and abetting the distribution of cocaine within a thousand feet of a playground.

THE COURT: All right. Do you understand what [6] you're charged with?

THE DEFENDANT: Yes.

THE COURT: In Count 2, you're charged with a conspiracy. A conspiracy means that you were acting with at least one other person to plan or commit—or attempt to commit a crime. It's the—it's like a partnership in crime, you and somebody else involved in criminal activity. It can be as simple as planning an activity or acting in some way to further the activity.

But what the Government must prove is that you intentionally joined the conspiracy with a mental purpose to evade the law and violate the law. And the gist of the charge of conspiracy is that you planned to commit a crime with at least one other person, that you intentionally joined a criminal group for that purpose.

In Counts 11, 21 and 28, you're charged with actually distributing cocaine or aiding and abetting the distribution of cocaine, that is, helping someone else do it, setting it up, acting as a courier for either the drugs or the money or something of that sort.

So you're charged in four counts. One—the second count is conspiracy, and Counts 11, 21 and 28 are distribution or aiding and abetting the distribution of cocaine within a thousand feet of a school, and in regard to Count 28, a playground. The penalties are higher when a [7] school or a playground are involved.

And another important factor is that you're charged in Count 2 with conspiring to distribute more than five kilograms of cocaine, and that makes the penalties more severe.

MR. MORLEY: Judge, we don't agree as to the quantity in this case.

THE COURT: I understand that you're going to contest her involvement in more than five kilograms.

MR. MORLEY: That's correct, sir.

THE COURT: And that's going to be determined at sentencing.

MR. MORLEY: Exactly, sir. And—

THE COURT: You're going to have a hearing on that.

MR. MORLEY: Right. And I've explained that to Ms. Mitchell.

THE COURT: Okay. But she should understand that if she loses that issue, penalties would be much more severe.

MR. MORLEY: Yeah, I've explained that to her.

THE COURT: Okay.

Now, it's very—the range of punishment here is very complex because we don't know how much cocaine the Government's going to be able to show you were involved in. So listen closely while we go over the range of penalties, and Ms. Miller will do that for us.

[8] MS. MILLER: On Count 2, Miss Mitchell faces a mandatory minimum of ten years up to a maximum of life imprisonment, a maximum fine of $4 million, a mandatory minimum of five years up to lifetime supervised release; and a $50 special assessment.

On each of Counts 11, 21 and 28, Miss Mitchell faces a mandatory minimum of one year imprisonment up to a maximum of 40 years imprisonment, a maximum fine of $2 million, a mandatory minimum of six years supervised release up to lifetime supervised release, and a $50 special assessment.

On all counts, Miss Mitchell would face a total of a mandatory minimum of ten years up to a maximum of lifetime imprisonment, a $10 million fine, a mandatory minimum of six years up to lifetime supervised release, and a $200 special assessment. That would be on all counts.

THE COURT: Okay. Now, the penalties you just set forth, Ms. Miller, assume there's a five-kilogram involvement?

MS. MILLER: That's correct, sir.

THE COURT: So those are the penalties if the Government can prove that you were involved in five kilograms of cocaine distribution. Your lawyer says you're not, is that right?

MR. MORLEY: That's correct, sir.

THE COURT: So if you're not, then the penalties [9] would be less. What do you think the quantity is going to come out to be?

MR. MORLEY: Judge, we would—we believe the penalty—the quantities are as specified in the three substantive counts, which is about 85—I believe it's between 50 and 100 grams of—

THE COURT: And what would the penalty be in that case?

MR. MORLEY: The penalty in that case is, I believe, a maximum of ten years. And the—what I've discussed with—at length with Miss Mitchell is the Sentencing Guideline range as well.

THE COURT: And what would that be?

MR. MORLEY: The Guideline range in that is 15 to 21 months, not including various adjustments for—

THE COURT: Acceptance—

MR. MORLEY: —acceptance of responsibility, level of participation. I've explained to her that there are a fudge factor of points going up and down. I've showed her the graphs and how that might work.

THE COURT: More than minimal planning could add it—

MR. MORLEY: More than minimal—

THE COURT: —add to it.

MR. MORLEY: —could add to it, and minimal [10] participation could subtract to it—

THE COURT: Do you think—

MR. MORLEY: —from it.

THE COURT: —do you plan to make a plea to me that, at sentencing, that there should be an non-incarceration sentence?

MR. MORLEY: It's my hope to either make a non-incarceration or a—or some form of house arrest, a home detention.

THE COURT: Okay. And the Government's going to oppose that at this point?

MS. MILLER: Yes, sir. The Government will have to ask for a term of imprisonment. As the Court is aware, this is not a cooperation plea. As counsel has indicated, there is no cooperation anticipated at this time with respect to this defendant.

And, Judge, I must—I must note for the record that under 21, USC 860(a), which is the offense involved in Counts 11, 21 and 28, each of those counts does carry a mandatory minimum of one year imprisonment even if the Court finds, as counsel has suggested he will argue, that the only amounts involved were the small amounts of cocaine sold on those days.

And that section carries a statutory possible maximum of up to 40 years imprisonment because the offense [11] occurred within a thousand feet of a school.

THE COURT: Does the mandatory minimum on the three counts—is the—the mandatory minimum would still be one year—

MS. MILLER: Correct.

THE COURT: —even though there's three counts? All right.

MS. MILLER: Even if all three counts are—are consecutive, so to speak, it's still just a one-year mandatory minimum.

THE COURT: You're going to argue to the contrary?

MR. MORLEY: At—no, your Honor.

THE COURT: All right. Well, then your client needs to understand that—

MR. MORLEY: Understand that she's facing at least one year in jail.

THE COURT: —that you're going to do at least one year in jail for this. Because what Ms. Miller says sounds

right to me on the law, that is, that there's a minimum mandatory for the school and playground counts even if the amount of the cocaine is as small as Mr. Morley and you say it is. I still would have—my hands would be tied. I'd have to sentence you to at least one year in jail on those counts.

Now, if Ms. Miller thinks there's more cocaine [12] involved, she's going to argue on Count 2 that some of the quantities that other people were dealing in are attributable to you because you knew about it and were helping them in the operation. You're going to deny that, as I understand?

MR. MORLEY: That's correct, sir.

THE COURT: And I'll have to make that decision. But the point you need—what you should have in your mind is what's this Judge going to do with that problem? Is he going to be harsh with me and give me a ten-year minimum mandatory if it's more than five kilograms or a five-year if it's more than 500 grams?

And I just have—I don't know what I'm going to do with that. I'm going to have to hear the evidence and find out how serious your involvement in this case was. If it's like Mr. Morley says, then it's going to be one year. If it's like Ms. Miller says, it could be a ten-year minimum mandatory.

So you're exposing yourself to serious punishment depending on the quantity involved.

Now, there's also Sentencing Guidelines. What are the Sentencing Guidelines if it were the minimum amounts, less than 100 grams?

MR. MORLEY: Less than 100 grams, Judge, I believe it was—

THE COURT: 15 to 21 months?

[13] MR. MORLEY: —15 to 21 months.

THE COURT: Okay. So there's also a possibility than it could be more than 12 months by several months if that's the applicable Guideline.

Your lawyer is going to argue that it should be less than 15 months because you're pleading and accepting responsibility. The Government is going to argue that you should do 15 months probably, if it comes in at 100 grams or less.

You also need to know that if you plead guilty to the four counts, there will be a $200 special assessment. I could impose a fine against you, but I assume you cannot—you don't have much money to pay a fine, am I right?

THE DEFENDANT: Right.

THE COURT: So if you're—if you don't have any money, then you won't be subject to a fine. You will have to be on supervised release for between six years and life after you get out of jail, and we'll have to argue about that at your sentencing. Your lawyer is going to argue for six years. The Government may argue for longer.

You should understand that supervised release is like probation or parole. You'll be out, but if you violate your probation or parole, in this case, your supervised release, you can be sent back to jail even if you've had a lot of good time on your supervised release for—suppose I [14] give you—suppose you do a year in jail and six years on supervised release.

You do your year. You do five and a half years on supervised release and no problems; the last six months, you have a dirty urine or something like that, you can go back to jail for a substantial period of time even though you've done five and a half months of good time on supervised release without incident.

Are you a citizen of the United States?

THE DEFENDANT: Yes.

THE COURT: Now, you're giving up a number of your rights by pleading guilty. One set of rights that you're giving up are your pretrial rights. You have the right to file motions to suppress evidence. The Government here was using electronic surveillance and wiretaps. They have to do that according to the law. If they made any mistakes, you can move to suppress the evidence.

If you made any statements when you were arrested without being warned that you could have an attorney or of your right to remain silent, Mr. Morley could move to suppress that evidence.

If you were searched without a warrant, he could move to suppress that evidence. These are some of the things you and he should have been speaking about. The point is, if you plead guilty today, all of your rights to attack the [15] Government's procedures pretrial are gone, including any misconduct before the Grand Jury.

Now, you have a right to plead guilty, and you also have a right to go to trial. Even though you and the U.S. Attorney's Office have worked out this plea agreement, you can still back out. It's not binding on you until you say it in open court and I approve it, and that hasn't happened yet.

If at any time you get queasy about this arrangement or you want to think it over or anything like that, just step to the side with Mr. Morley, and you can go over it with him privately, outside of my hearing. If you have any questions of me, stop me, and I'll be happy to explain it to you.

You should understand that pleading guilty has the same effect as if 12 people in the jury box find you guilty. Then there—if you plead guilty, there won't be a trial, and what will happen is that in January, you'll be brought in for sentencing.

You give up all of your rights to have a trial if you plead guilty. The most important right at a trial is the right to the presumption of innocence and the requirement that the Government prove its case against you beyond a reasonable doubt.

If you plead guilty today, those very important rights are gone.

You have the right to have your case decided by a [16] jury who's selected—after your attorney has the right to challenge jurors for cause or peremptorily, even if he doesn't like the way they look. You can participate

with him in jury selection, which is what we're going to do as soon as we're finished with the two pleas we're taking.

You give up the right to confront and cross-examine the Government's witnesses against you. You have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy.

You may present witnesses in your behalf including character witnesses.

If you plead guilty, all of those rights are gone.

Mr. Morley has the right to make an opening statement to the jury and a closing argument. That right is gone if you plead guilty.

He also has the right to submit points of law to me to read to the jury. That right is gone. If he loses the case, he can appeal. And if he—and if you go to the jury on this case, you can only be convicted if the jury is unanimous.

If you plead guilty, all of those trial rights are gone.

Now, you should understand that there's some—there's some uncertainty in what your punishment is going to [17] be. If after—if at the sentencing hearing, it turns out that your involvement with drugs is more extensive than Mr. Morley tells—is telling me now, you'll be punished more severely. But at that point, you can't say, "Well, Judge, then I'll take my chance on a trial."

If you plead guilty today, that's the end of it and you can't come back later and change your mind. That's why we're being very careful to go over everything with you.

I take it there's no plea bargain here, Mr. Morley?

MR. MORLEY: There's no plea agreement, Judge.

THE COURT: It's an open plea to Counts 2, 11, 21, and 28?

MR. MORLEY: That's correct, sir.

THE COURT: And you're getting no other promises from the Government?

MR. MORLEY: That's correct, sir.

THE COURT: And you're giving none?

MR. MORLEY: And we're giving none.

THE COURT: Okay. This is what we call an open plea. You're pleading to these charges. The Government is not giving you anything, and you're not giving the Government any cooperation, is that—is that correct? Would you say yes or no so we pick it up?

THE DEFENDANT: Yes.

THE COURT: And nobody else has promised you [18] anything?

THE DEFENDANT: No.

THE COURT: Nothing in the back room or anything that I don't know about?

THE DEFENDANT: No.

THE COURT: Okay. Ms. Miller, will you state the factual basis for the charges against Miss Mitchell? And, Miss Mitchell, you listen to what she says, and if there's anything wrong, you correct it after she's finished.

MS. MILLER: Yes, sir. With respect to Count 2, the Government's evidence would include eyewitness testimony as well as consensually recorded and taped conversations, as well as—and agent surveillance showing the following:

That during at least 1992 and 1993 at various times, Amanda Mitchell was part of a group of individuals headed in part by Harry Riddick, who distributed cocaine on a daily basis, daily and weekly basis, to customers in the Allentown, Pennsylvania area.

Miss Mitchell was, on occasion, provided vehicles and pagers and cocaine by Harry Riddick for distribution to customers approved by him and by other supervisors within the group. And at various times, she did distribute cocaine as part of this group, taking advantage of the facilities provided by Harry Riddick and others.

With respect to Count 11, the Government would prove [19] through eyewitness testimony and consensually recorded conversations and agent surveillance that on April 9th, 1992, at the location indicated, Miss Mitchell did

assist another individual in distributing a quantity of cocaine within a thousand—to a customer within a thousand feet of the Washington Elementary School.

With respect to Count 21, the Government's evidence would show through eyewitness testimony, a consensually recorded conversation and agent surveillance that on the date indicated and at the location indicated, Miss Mitchell did distribute a quantity of cocaine to a customer within —at a location within a thousand feet of the Washington Elementary School.

And finally with respect to Count 28, the Government's evidence would show that on the date indicated and at the location indicated in that count, that Miss Mitchell did distribute a quantity of cocaine to a customer within a thousand feet of the Franklin Playground on those dates mentioned.

THE COURT: Did you do that?

THE DEFENDANT: Some of it.

THE COURT: What didn't you do?

THE DEFENDANT: The—the first one.

THE COURT: Which is?

THE DEFENDANT: I think 11.

[20] MR. MORLEY: The first one—well, you were with—

THE DEFENDANT: There was four other people there.

MR. MORLEY: Yeah.

THE DEFENDANT: Yeah.

MS. MILLER: Perhaps she's referring to Count 11?

MR. MORLEY: Count 11?

THE DEFENDANT: Is that 11?

MR. MORLEY: Yeah.

THE DEFENDANT: That's the one. Four people? I wasn't there.

R. MORLEY: Excuse me, Judge. May I just speak with Miss. Mitchell?

THE COURT: Sure.

MR. MORLEY: Thank you.

(Pause in proceedings.)

MR. MORLEY: Judge, we've clarified that point. She was looking at the indictment that listed four people, and didn't recall that there were four people there that day. And, in fact, what it is, is there is aiding and abetting.

There are persons who are considered aiders and abettors who were not present. She agrees she was present and participated in a manner that was described in the discovery.

THE COURT: Is that correct, Miss Mitchell?

THE DEFENDANT: Yes.

[21] THE COURT: You remember now that you have some involvement with Count 11?

THE DEFENDANT: If they say I did. I don't remember.

MS. MILLER: Your Honor, If I could clarify briefly? On that date in question in Count 11, the circumstances were that the customer had paged Harry Riddick, that among the events that occurred, James Adams called back to let the customer know that someone would be coming shortly to deliver the cocaine. And the two individuals who arrived to deliver the cocaine were Richard Thompson and Amanda Mitchell.

It was Richard Thompson who physically had the cocaine in his possession and physically turned it over to the customer. However, Miss Mitchell was present for the purpose of being introduced to this customer so that in the future Miss Mitchell would also be known to that customer and would be able to sell cocaine to her.

And in that sense, by accompanying Mr. Thompson, not only for the purpose of getting to know the customer but also for the purpose of assisting in this delivery, Miss Mitchell aided and abetted that distribution, although she did not personally hand over the cocaine to the customer on that date.

She later did deal with that customer as indicated in the subsequent counts of the indictment.

[22] MR. MORLEY: Judge, what Miss Mitchell explained to me was that she was there that day, and basically was part of that in the manner that the Prosecutor has described, a part of that delivery. And I explained to her what aiding and abetting involves.

However, she does not agree with the Government's purpose for—that is, she was introduced to that customer for future deliveries, since she knew that person for years already. But she was, as far as I understood, from both from my client as well as from the discovery, aiding and abetting that delivery.

THE COURT: I don't think it makes much difference in the punishment, but she does have some defense to Count 11. She could say she was merely present.

MR. MORLEY: I agree, Judge, that's a mere presence argument as to one count.

THE COURT: And that she really didn't do anything. She didn't take a step to further the transaction. And you could argue that the purpose—her being there to be introduced for future deals is not aiding and abetting the deal that went down on the—in Count 11.

So it's okay with me if you want to plead with—to Count 11, if you understand that you do have a defense to it, and you could stand trial on that defense. I don't know if your defenses to the other counts are as good. They probably [23] aren't, but I don't know that.

I'll permit you to plead guilty to Count 11 even if you have a defense to it, because I don't think it's going to make too much difference in your sentencing. But that's your choice.—You have a—you—I don't want you really to plead to something you didn't do, or that the Government can't prove you did. And that's your choice. So you have a right not to plead guilty and stand trial on all these things if you want to.

You should know this, that if you stand trial on these things, it's possible it could get worse for you, but it's possible you could win. It's sort of a risk that you would be taking.

THE DEFENDANT: Okay. I'll plead guilty to that one.

MR. MORLEY: Okay.

THE COURT: So do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Okay. Mr. Morley, do you have any questions of Mr. Leh, the case agent?

MR. MORLEY: Not at this time, Judge.

THE COURT: Ms. Miller, do you have any questions of Mr. Leh?

MS. MILLER: No, sir.

THE COURT: Do you have any questions of your [24] client?

MR. MORLEY: No, sir.

THE COURT: Miss Mitchell, do you have any questions of me?

THE DEFENDANT: No, sir.

THE COURT: I'm asking both counsel, are you satisfied that if Miss Mitchell changes her plea, she would be doing so knowingly, intelligently and voluntarily?

MR. MORLEY: I agree, Judge, she would be doing so.

MS. MILLER: Yes, sir.

THE COURT: All right. Miss Mitchell, I find that you understand the nature of the charges against you. I find that you understand what a conspiracy is and that what distribution of cocaine is, and what aiding and abetting the distribution of cocaine is.

I find that you have a possible defense to Count 11, but that if you wish to plead guilty anyway, I would accept your plea.

I find that there's a factual basis for the plea. I find that you understand your pretrial rights, your trial rights.

I find that you understand as well as it can be understood the range of punishment to which you're exposing yourself including imprisonment. It looks like a minimum of one year and supervised release of a minimum of six years, all the way up to life on supervised release.

[25] So you have—I think you have a full and completely understanding of what you're facing and what the tradeoffs are.

Are you doing this of your own free will?

THE DEFENDANT: Yes.

THE COURT: Miss Mitchell, you previously pleaded not guilty at Criminal Number 94-159, to Counts 2, 11, 21 and 28.

How say you now to Counts 2, charging you with conspiracy to distribute cocaine; Count 11 and 21, charging you with distribution and/or aiding and abetting the distribution of cocaine within 1,000 feet of a school; and Count 28, charging you with distribution or aiding and abetting distribution within 1,000 feet of a playground, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: I'll accept your guilty plea. What kind of bail do we have here?

MS. MILLER: Your Honor, I—I'm afraid blanking on the conditions of bail, but the Government would ask that they continue. I don't think its OR bail. I think something was posted for it.

THE DEFENDANT: OR.

THE COURT: What kind of bail is there, Mr. Morley?

MR. MORLEY: I believe—I believe she's on OR, but [26] with—with restrictions and conditions attending employment, and for a while, I think you were getting drug treatment?

THE DEFENDANT: Uh-huh.

MR. MORLEY: There was drug treatment, drug screening for a while.

THE COURT: We'll allow some bail to continue, and you may—why don't you take her to the Probation Office—

MR. MORLEY: I will, Judge.

THE COURT: —and see that they can set up a pretrial sentence arrangement for her. She should continue to report to the Pretrial Services Officer as she's been doing.

MR. MORLEY: Fine, Judge.

THE COURT: Mr. Smith, when will we have sentencing in this case? Okay. We'll schedule sentencing some time in January, I would think.

MR. MORLEY: Okay.

THE COURT: Thank you, Mr. Morley.

MR. MORLEY: Thank you, Judge.

THE COURT: Miss Mitchell, you may be excused.

(Proceedings concluded at this time.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted in Printing]

SENTENCING HEARING
BEFORE THE HONORABLE EDWARD N. CAHN
UNITED STATES DISTRICT JUDGE

[2] (The following was heard in open court at 1:35 o'clock p.m.)

(The Judge's microphone was not on, and therefore, the transcript contains many inaudibles.)

THE COURT: We're going to start with Amanda Mitchell.

MS. MILLER: Yes, sir.

THE COURT: I have your sentencing memorandum. Do you have anything else to add?

MS. MILLER: Sir, the Government has brought to court, and I wish the case agent were right here. Paul Belfield is present in the courthouse, and—should counsel wish to cross-examine him about his testimony at trial. Shannon Riley is present should counsel wish to cross-examine her about her testimony at trial; also Richard Thompson.

With respect to Richard Thompson, your Honor—

THE COURT: The case agent is here now.

MS. MILLER: Oh, good. Would you bring Richard Thompson up.

With respect to Richard Thompson, your Honor, the Government does call Richard Thompson to provide additional details concerning time periods and amounts of cocaine involved with Miss Mitchell because he was not

asked expressly about Miss Mitchell at trial, since she was not on trial.

[3] The Government—the Government anticipates that, from my point of view, that testimony will be brief, about ten minutes. And he should be right outside, and he should be brought in immediately to do that. So the Government will be relying on the testimony of those three individuals with respect to Miss Mitchell, and that's it.

And I apologize for the delay, your Honor. I thought Mr. Thompson would be in here when we started.

THE COURT: We have plenty of time.

MS. MILLER: But he should be here in a minute, and I appreciate the Court's patience.

THE COURT: If you want to give me—as long as we're waiting, why don't you give me your calculations of the quantities. Do you—are you relying on the probation officer's calculations—

MS. MILLER: Yes, sir.

THE COURT: —or do you have some of your own?

MS. MILLER: No, sir. The Government is relying on the probation officer's calculations.

(Pause in proceedings.)

MS. MILLER: That would be as set forth in Paragraph 150 on Page 23. The Government submits that, based on the trial testimony plus the matters that Mr. Thompson will testify to—I see he's in the courtroom at this time. Well, perhaps I should go over that after Mr. Thompson has [4] testified.

THE COURT: Okay.

Mr. Thompson, you may take the stand please, and you may be sworn.

RICHARD THOMPSON, Government's Witness, Sworn.

AUDIO OPERATOR: Please spell and state your name for the record.

THE WITNESS: Richard Thompson, R-I-C-H-A-R-D, T-H-O-M-P-S-O-N.

MS. MILLER: May I proceed, your Honor?

THE COURT: You may.

MS. MILLER: Thank you, sir.

DIRECT EXAMINATION

BY MS. MILLER:

Q Mr. Thompson, do you adopt your testimony given at the trial of United States versus Harry Riddick as your testimony for purposes of this proceeding?

A Yes.

Q I have some additional questions to ask you.

Sir, directing your attention specifically to the time period April of 1992 and May of 1992, did you have occasion to work with Amanda Mitchell?

A Yes.

Q And would you tell the Court how that came about, how Amanda Mitchell came to work with you?

[5] A I was informed that she was going to be working with us and I had to take her around by Harry.

Q Okay. And did you have an opportunity to observe how many days per week Miss Mitchell was working for Harry Riddick?

A Yes.

Q And how many days per week was that?

A Basically, two to three.

Q I'm sorry, sir?

A Between two to three.

Q Now, at that time, how much—would you review for the Court how much cocaine you would receive from Harry Riddick in what was called the big bag at the beginning of your workday?

A We got a bag, approximately, an ounce and a half to two ounces.

Q Okay. And did Amanda Mitchell share your bag or did she get a separate bag?
A She had a separate bag.
Q From whom?
A From Harry.
Q And—
MR. MORLEY: Judge, I couldn't hear the answer.
THE WITNESS: From Harry.

BY MS. MILLER:

[6] Q And when you say Harry, do you mean Harry Riddick?
A Yes.
Q Were there occasions when Harry Riddick gave you what had to be taken to Amanda Mitchell for her to sell that day?
A Yes.
Q And at that time, did you have—did you actually hold that bag in your hand?
A Yes.
Q And did you have an opportunity to observe how much cocaine was in that bag?
A Approximately the same amount that I had in my bag.
Q All right. Now, directing your attention to the time period June of 1992 through August of 1992, at that point, were you—did you have possession of Harry Riddick's beeper at that point in June, '92, through August, '92?
A Yes.
Q And did there come a time when Amanda Mitchell worked for you?
A One time.
Q When you say one time, explain to the Court what you mean.
A One day.

Q Okay. And after that one day, what, if anything, happened so that Amanda Mitchell stopped working for you?
A Just was told—I was just told that she didn't want to [7] work no more for me.
Q And who told you that?
A By Harry.
Q Okay. Thereafter, however, what, if anything, did you determine about what Amanda Mitchell was doing in that June, '92, through August, '92, time period?
A I was told that she would be—
MR. MORLEY: Objection, your Honor.
THE COURT: Overruled.
MR. MORLEY: Foundation, Judge, I—I was told by whom, where, when?
THE COURT: All right. Lay a foundation.

BY MS. MILLER:

Q Mr. Thompson, who were you speaking with who told you about—
A Kathy.
Q —Amanda Mitchell's activities?
A Kathy.
Q Who is Kathy?
A Hottenstein.
Q Okay. And did Kathy Hottenstein tell you about Amanda Mitchell's activities in June through August of '92?
A That she was probably going to be at Phill's working over there.
Q Who was going to be at Phill's?
[8] A Amanda.
Q And when you say working over at Phill's, what did you understand her to mean?
A Possibly just selling over there.
Q Selling what?
A Cocaine.

Q Now, directing your attention to the time period August of 1992 through about December of 1993, did something different happen that covered that whole time period, August, '92, to about December of '93.

A Kathy was in charge of the pager then. She was running the things. Amanda was working for Kathy.

Q Okay. Now, how often were you with Kathy Hottenstein during this period August '92, through late—

A It varied, almost every day, every other day.

Q Did you have an opportunity to observe yourself how many days per week Amanda Mitchell worked under Kathy Hottenstein's supervision?

A Anywhere between three to five.

Q Three to five—

A Three to five days a week.

Q Okay. Per what?

A Per week.

Q Okay. And were you ever present when cocaine was being bagged by Kathy Hottenstein?

[9] A Yes.

Q Was Amanda Mitchell ever present on those occasions?

A I wasn't there, but she said she was either over there with her or she went over to her house, or she came over to her house.

Q Who said—

A Kathy either went over to Amanda's house, or Amanda was over at Kathy's house during certain times.

Q To do what?

A To bag.

THE COURT: Did you see this or were you told this?

THE WITNESS: I was told this.

THE COURT: By whom?

THE WITNESS: By Kathy.

BY MS. MILLER:

Q And when you were with Kathy Hottenstein, did there come a time when you saw Amanda Mitchell receive something from Kathy Hottenstein?

A Yes.

Q What did you see Amanda Mitchell—

A A bag of cocaine.

Q Were you able to observe how much cocaine Kathy Hottenstein was providing to Amanda Mitchell?

A Yes.

Q How much?

[10] A Broken up bags, between, like I say, an ounce and a half, two ounces.

Q And how frequently did you observe that to occur?

A That varied during the week.

Q All right. Now, directing your attention to the time period December, 1993, around December of 1993, did something else change, late 1993, January, '94?

A Kathy stopped—Kathy stopped, I know.

Q Kathy stopped doing what?

A Being in charge of the pager.

Q Okay. And at that point, what, if anything, did Kathy Hottenstein tell you occurred when she gave up the pager?

A That Lori and Amanda was in charge.

Q And how long did that continue?

A A couple months, two to three.

Q When you say a couple months, just give the Court your best estimate.

A Anywhere between two to three, anywhere between two to three.

Q Okay. And so what—what end—what end time period would you put on that? Are we talking 1994 or what?

A '93 into '94—into '94.

Q Okay.

MS. MILLER: I have no other questions of this witness, your Honor.

[11] THE COURT: You may cross-examine.

MR. MORLEY: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. MORLEY:

Q Mr. Thompson, you haven't been sentenced yet, is that correct?

A No, I haven't.

Q Okay. And you're going to be sentenced by Judge Cahn?

A Yes.

Q Okay. And that is after you've completed testifying in this case?

A I don't really know when.

Q You don't know when, okay.

Do you recall giving a—meeting with the Government back in July of '95?

A Yes.

Q Okay. And do you recall meeting with them and discussing with them everything you knew about the case?

A Yes.

Q Okay. And at that time, you were seeking to cooperate with them, is that correct, with the Government?

A I guess it was to make a plea, I guess.

Q Okay. Well, and part of the plea would be a cooperation plea so that you could receive a lesser sentence, is that correct?

[12] A Probably.

Q Now, when you did that, you, of course, wanted to give as full and complete disclosure of everything you knew about this to try to make the best possible deal for yourself, right?

A Just to give a disclosure, period. I don't know about making the best deal.

Q Well, but you wanted to be honest and truthful with the Government, right?

A Right.

Q Okay. Because you didn't want to be lying to the Government and then have it come back on you some time later, right?

A Correct.

Q So you told them everything that you've told us today, is that correct?

A Correct.

Q Okay. Well, Mr. Thompson, I'd like to show you what I've been furnished as a DEA-6, and I don't believe there's anything in here regarding your testimony that Amanda Mitchell was in charge for a couple of months in '94, and I don't believe there's anything in here—

MS. MILLER: Your Honor, I object to what counsel believes. If he could just ask the witness some questions about—

[13] BY MR. MORLEY:

Q Well, did you tell—did you tell the Government all about how Amanda Mitchell was in charge from December—was one of the people in charge of this organization or in charge of distributing?

A I wasn't questioned on that.

Q What?

A I was not questioned at the hearing—or, I mean, at the trial.

Q No, I'm talking about—I'm not talking about the hearing. I'm talking about your interview with the Government in July of '95, about a year ago.

A Not that I can recall.

Q So you didn't tell them about that?

A Not that I can recall, no.

Q Okay. And you didn't tell them that you observed Amanda Mitchell from August of '92 until December of '93 delivering three to five times a week, did you?

A I wasn't asked that, no.

Q You didn't—well, you were there to disclose—

A Right.

Q —what you knew about the organization?

A I wasn't asked that, right.

Q You were there to disclose what you knew about the organization, right?

[14] A Correct.

Q And you did not tell them that?

A I was not asked that.

Q Well, did you—were you asked to tell who the people were that were involved in this?

A I was asked who was—as far as conspirators, yes, as far as they called us—

Q Okay.

A —who was running, right.

Q Well, you did tell them something about Amanda Mitchell, right?

A Who was running, right.

Q Okay. And at that—and you told them that Riddick had one to three couriers working each day, and you named five couriers, and Amanda Mitchell was one of them—

A Right.

Q —one of the people you named? And that's about all you said about Amanda Mitchell at that time, about a year ago, right?

A Correct.

Q And you were specifically asked about incidents in 1993, and you made no mention of Amanda Mitchell in 1993, doing anything in '93, is that correct?

A Not at the time, no.

Q Okay. Okay. Now, you also—you were with Amanda [15] Mitchell when she made a delivery in April of '92 to Alvita Mack (ph)?

A Right.

Q And that was purportedly to introduce you to—introduce Amanda Mitchell to Avita Mack, is that correct?

A Right.

Q Were you aware that Amanda Mitchell had known Alvita Mack for years?

A No.

Q Were you aware that they had gotten high together for years?

A No.

Q Okay. So you weren't aware of that at that time?

A I wasn't aware of it at all.

Q Okay. You continued to supply Alvita Mack with cocaine on a regular basis, is that correct?

A Correct.

Q Okay. Now, can you tell me where Amanda Mitchell was in, let's say, early to mid September of '92?

A Can I tell you where she was? No.

Q Was she—was she working in early to mid September, '92?

A I was out of it then.

Q Excuse me?

A I was out then.

[16] Q You were out then. Where were you?

A I was not working.

Q You were not working?

A Right.

Q What periods of time were you not working for this organization or for—dealing drugs?

A Between late August and October to November of '92.

Q To November of '92. When you say you were out, that meant that you were not seeing on a daily basis who was delivering to who and who was a courier?

A Correct.

Q Okay. Were you aware that Amanda Mitchell was in Florida for several weeks in September of '92?

A No.

Q Okay. But you didn't know where she was in the fall of '92, is that correct?

A Correct.

Q So to the extent that your testimony today was from August, '92, to December, '93, that you observed Amanda Mitchell three to five times a week being under Kathy's supervision, that's not correct because for at least several months of that period of time you didn't observe Amanda Mitchell, right?

MS. MILLER: Objection, compound question.

THE COURT: Reframe.

[17] MR. MORLEY: Okay.

BY MR. MORLEY:

Q You were not—you didn't see anybody—you testified earlier that between August, '92, and December, '93, you saw Amanda Mitchell delivering cocaine three to five times a week under Kathy Hottenstein's direction, correct?

A Correct.

Q Okay. But that's not entirely correct because you've just told us from August to November of '92, you didn't know what was going on in that organization, right?

A You said in September did I see her.

Q No. I just asked you from August—well, you told us from August to November, you were out of commission, right?

A Uh-huh.

Q And you earlier told us for about 15 months, from August, '92, to December, '93, you saw Amanda

Mitchell delivering cocaine three to five times a week, remember that, on direct examination?

A Correct.

Q Okay. That's not entirely correct because you didn't see anything in the fall, from August—the fall of '92, from August to November of '92, correct?

A I did see.

Q You did see?

A Right.

[18] Q You saw Amanda Mitchell—

A Right.

Q —from August to November?

A In between there, right.

Q In between there. How many times?

A I said between three to five times a week.

Q Every week even though you were not involved?

A I wouldn't say every week. I was not involved, but I was around Kathy at the time.

Q So you weren't keeping regular tabs on is what you're telling us, right?

A Well, about what Kathy was telling me.

Q This was what Kathy was telling you?

A Correct.

Q Okay. So you didn't actually see Amanda Mitchell—

MS. MILLER: Objection.

MR. MORLEY: —delivering those drugs.

MS. MILLER: Objection. Asked and answered.

THE COURT: Overruled.

BY MR. MORLEY:

Q You didn't actually see Amanda Mitchell with drugs at that time?

A I seen Amanda with the bag that either Kathy had gave her or that she was running for her.

Q But I thought you just told us you weren't around during [19] August to November, '92?

MS. MILLER: Objection, asked and answered.
THE COURT: Overruled. You may press.

BY MR. MORLEY:

Q I thought you just told us you weren't around the scene between August—

A I was not around running—

Q Let me finish the question—between August, '92, and November, '92?

A I was not around running—

Q Okay.

A —making deliveries. I was around Kathy Hottenstein at that time.

Q Okay. And around that time, you would see—on occasion, you would see Amanda Mitchell, or would you see her regularly, three to five times a week?

A Later on, yes.

Q What do you mean, later on?

A Later on in the year, later on towards the end of the year.

Q You mean like December, '92?

A It was around that time or before.

Q Okay. Fine. What I'm asking you about, though, is August to November, '92. What you're telling us is you didn't see? You keep avoiding that time period. You didn't [20] see in that time period, is that correct, sir?

A I'm telling you I wasn't involved at that time period, that Kathy was running the show and that Amanda was working for Kathy.

Q And that's the information you got from Kathy, right?

A Correct.

Q Okay. Now, from December, '92, to December, '93, were you back in with Kathy at that point in time?

A I wasn't quite really out with Kathy at that time.

Q Okay. Well, were you seeing her on a more regular basis? Were you living with her at that time?

A No.

Q How often would you see her?

A I guess approximately every day, every other day.

Q Okay. And during that time, it's your testimony that Amanda Mitchell was doing drugs three to five times a week under Kathy's direction, correct?

A Correct.

Q Were you present when Kathy bagged up the drugs?

A Yes.

Q Were you present when she delivered them to Amanda Mitchell?

A Yes.

Q And on how many occasions, did you do that, were you there when she did that?

[21] A I don't quite recall.

Q Can you recall any dates at all when she did that?

A Dates, no.

Q Can you recall any time periods at all?

A '93.

Q '93? Just '93?

A Well, you said dates in between. As far as actual dates, anywhere between January, February, on up to—maybe towards the middle—

Q Towards the—

A —off and on.

Q Towards the middle of '93?

A Right.

Q Okay. And then toward the middle of '93, what happened, it kind of tapered off?

A Some things I just didn't see.

Q Oh, you didn't see things after the middle of '93?

A Some things I just didn't see, right.

Q Okay. The things—the things that you didn't see were just things like who was getting the drugs?

A Correct.

Q Okay. So that would have been from the middle of '93 on? You have to answer yes or no, sir. You can't—

A I would assume, yes.

Q Okay. You can't just nod your head is what I'm saying.

[22] A All right.

Q So from the middle of '93 on you didn't see? Okay.

(Pause in proceedings.)

Q Now, you also told us about the time period of June to August of '92 when you had possession of Harry Riddick's beeper, right?

A Uh-huh, right.

Q Was that—you have to answer yes or no.

A Right.

Q Okay. And during that time period Amanda worked for you one day?

A Correct.

Q Okay. And do you recall what day that was?

A No.

Q Do you recall how much money she brought back from the sales of drugs?

A It wasn't much, maybe about three or 400.

Q But you don't recall specifically?

A No.

Q And you were told during that time period that she didn't—she had previously been making deliveries but you were told that during that time period, she didn't want to work anymore, is that right?

A For me, right.

Q Who told you that?

[23] A Harry.

Q Harry. And what you found out later from Kathy was that she was working at Phill's Bar?

A I did.

Q Is that what you found out?

A Yes.

Q And Kathy told you that?

A Correct.

Q Did you ever see Amanda at Phill's Bar?

A No. Working-wise? No.

Q Okay. She would go there to hang out, right?

A More or less.

Q To get high there, right?

A I wouldn't know.

Q You wouldn't know.

(Pause in proceedings.)

MR. MORLEY: Beg the Court's indulgence, let me just—

THE COURT: You may have indulgence.

MR. MORLEY: Thank you, Judge. I'm just—cases and transcripts.

(Pause in proceedings.)

BY MR. MORLEY:

Q Now, you did testify at trial about Amanda, correct?

A Yes.

[24] Q Okay. You just added some new things to your testimony today regarding her activities, is that correct?

A Correct.

Q And, Mr. Thompson, you are—you've plead guilty to conspiracy and related charges in this case?

A Correct.

Q Okay. Have you gone to jail yet?

A For what?

Q For this case? You haven't been sentenced yet? Have you been out on bail the whole time?

A Yes.

Q Okay. And you understand that the Government, if you continue to cooperate with the Government, you'll —they will make a motion to his Honor, Judge Cahn, so

that you can receive a sentence below the Guidelines, is that correct?

A Correct.

Q And also below the mandatory minimum, is that correct?

A I just know below the Guidelines. I don't know anything further.

Q Okay. Do you know what your Guidelines are without this motion?

A Ten to life.

Q And you don't want to go to jail for as much as ten years or as much as life, is that correct?

A I don't believe anybody would.

[25] Q Okay. Well, specifically you don't want to, is that correct?

A Yes.

Q Were you aware of Amanda Mitchell's drug use during '92?

A As far as totally being aware of?

Q Did you ever notice of her using?

A I never seen her using.

Q You didn't see her using?

A No.

Q Did you see her with the effects of drug use?

A The what?

Q The effects of drug use? Did you—

A I haven't seen her using. I wouldn't know what the effects of them on her.

Q You yourself were a drug user between '92 and '94, is that correct?

A Correct.

Q And that would have been the time period that you are testifying about today?

A Correct.

Q Okay. And you were using cocaine during that period of time?

A Correct.

MR. MORLEY: I have nothing further. Thank you, Judge.

[26] THE COURT: Do you have any redirect?

MS. MILLER: Oh, no, sir.

THE COURT: Mr. Thompson, you may step down.

THE WITNESS: Okay.

(Witness excused.)

THE COURT: You may call your next witness.

MS. MILLER: Your Honor, the Government does rely on the testimony of Paul Belfield and Shannon Riley. They are both in the courthouse.

THE COURT: And they're available for cross-examination?

MS. MILLER: Yes, sir.

MR. MORLEY: Judge, may I—may I discuss one matter with—

THE COURT: Of course.

MR. MORLEY: —with counsel, and we might be able to preclude the necessity of calling a witness.

(Discussion off the record.)

MS. MILLER: Your Honor, counsel has indicated that he wants Shannon Riley. I see the case agent has left the courtroom again. May I get the case agent to have Miss Riley brought up?

THE COURT: Sure.

MS. MILLER: Thank you, sir. If I can have your indulgence for just a minute.

[27] (Pause in proceedings.)

MS. MILLER: I'm sorry, your Honor, the case agent appears to have gone downstairs, and I'm told it's to bring someone up. But since he didn't have any instructions at the time he left, could I have the Court's permission to use the phone to call—

THE COURT: Sure.

MS. MILLER: —and make sure he brings up—

(Pause in proceedings.)

MS. MILLER: Thank you, your Honor.

THE COURT: Could you just, while we're waiting, perhaps you could brief me on what issue—there was a plea here to Count 2, is that right?

MS. MILLER: Yes, sir.

THE COURT: An open plea?

MS. MILLER: Yes, sir.

THE COURT: Count 2 carries with it a mandatory ten-year sentence, does it not?

MS. MILLER: Correct.

MR. MORLEY: A mandatory ten-year?

THE COURT: Yes.

MS. MILLER: Yes.

MR. MORLEY: No, Judge. Count 2?

THE COURT: Count 2.

MR. MORLEY: If I'm able to—

[28] MS. MILLER: Conspiracy to distribute more than five kilograms of cocaine.

MR. MORLEY: No, we specifically disputed the quantity at the time of the entry of the plea, Judge.

THE COURT: That was my question.

MR. MORLEY: Yes.

THE COURT: I have a recollection that you did reserve that.

MR. MORLEY: Yes, we reserved that, Judge. We specifically reserved that. What she is subject to is the mandatory one year on distributing near a protected area.

THE COURT: Well, if I find that she was involved in five kilograms or more, then she has a mandatory ten.

MR. MORLEY: Right.

THE COURT: So the point here being that while the Probation Office has attributed about 19 kilograms to Amanda Mitchell, which triggers a 121-month sentence, five kilograms triggers 120-month sentence. So you don't

have—you have lots of downward leeway, and you only lose a month.

MS. MILLER: Yes, sir.

THE COURT: From a prosecution standpoint.

MS. MILLER: Right. That is correct, your Honor.

(Pause in proceedings.)

THE COURT: You may swear Miss Riley.

SHANNON K. RILEY, Government's Witness, Sworn.

[29] AUDIO OPERATOR: Please spell and state your name for the record.

THE WITNESS: My name is Shannon Katherine Riley, S-H-A-N-N-O-N, K-A-T-H-E-R-I-N-E, R-I-L-E-Y.

DIRECT EXAMINATION

BY MS. MILLER:

Q Good afternoon. Miss Riley—Miss Riley, do you adopt your testimony at the trial of United States versus Harry Riddick as your testimony for purposes of this proceeding?

A Yes, I do.

MS. MILLER: I have no other questions, your Honor.

THE COURT: Cross-examine.

MR. MORLEY: Thank you, Judge.

CROSS-EXAMINATION

BY MR. MORLEY:

Q Miss Riley, my name is Steve Morley. I represent Amanda Mitchell. I just have a couple of questions for you.

You entered into an agreement with the Government to cooperate with them?

A That's right.

Q Okay. And in return for that, you received a certain consideration towards a sentencing, is that correct?

A I hope that I will.

Q You hope so. And you entered into this agreement—when you entered into this agreement, you sat down with the [30] Government and you told them what you knew about the drug dealing in this organization, is that correct?

A Right.

Q And at least at that time, and that time would be on—I have two reports, one, June 10th, 1994, and September 29th, 1994. Do you recall meeting with the Government on those days?

A Yes, I do.

Q And at that time—now, have you maintained your cooperative stance with the Government throughout this, or have you wavered some?

A In June, I didn't agree to cooperate at that point. But from September—

Q From September, '94, on—

A Right.

Q —you had agreed to cooperate?

A Yes.

Q Okay. And in September 29th, 1994, with your agreement to cooperate, you wanted to let the Government know in full force everything you knew about the drug dealing on that scene, is that correct?

A Yes.

Q And that's because you wanted to show everything you could to be—to be as cooperative as possible in order to get the benefit of a downward departure on your sentence, [31] correct?

A Right.

Q Okay. Now, I have the—your proffer from September 29th, 1994, where you identify lots of people. You don't mention Amanda Mitchell at all. Did you recall that?

A No, I don't. I mean, I don't remember who I—

Q Okay.

A —who I mentioned or not.

Q Well, you gave a list of people who dealt at Phill's Bar, and Amanda Mitchell was not one of them.

A Okay.

Q Okay. You gave a list of people who you said were working for Harry Riddick. You did not list Amanda Mitchell.

MS. MILLER: Objection. Is this a statement or a question, your Honor?

BY MR. MORLEY:

Q Is that correct?

A If you show me my statement, if you say that's what I said, okay.

MR. MORLEY: May I approach the witness, Judge?

THE COURT: You may approach.

MR. MORLEY: Thank you.

BY MR. MORLEY:

Q You can look at it off there. I just turned it to the appropriate page. I think it's 20—

[32] Okay. If you said I didn't mention her name, then I didn't, so—

Q Okay. If you want to take your time to go through it, you can.

A No.

Q Okay. At trial, you testified that you saw Amanda Mitchell acting in a fashion like she was selling drugs at Phill's Bar, is that correct? I mean, I probably—

A I don't believe those were my exact words.

Q Okay. Your words are of the record, and I don't have them fished out at this point. But basically, you saw her go upstairs with people and come downstairs—

A Right.

Q —and making eye glances. And what did you assume that to mean?

A People would come in the bar. They would make eye contact with somebody and then meet them in the back room and come out a few seconds later.

Q Okay.

A And I noticed her doing that a few times also.

Q Could she be buying?

A She could have been doing anything.

Q So you don't know that she was selling drugs on those occasions, do you?

A No.

[33] MR. MORLEY: Okay. I have no further questions.

THE COURT: You may inquire.

MS. MILLER: I have no other questions.

THE COURT: You may step down, Miss Riley, and be excused.

(Witness excused.)

THE COURT: Is there anyone else? Do you wish to examine Mr. Belfield?

MS. MILLER: No, sir. No, sir.

MR. MORLEY: Yes, yes. I'd like to examine Mr. Belfield briefly.

MS. MILLER: Your Honor, I believe he's right here.

THE COURT: Okay.

MS. MILLER: And the marshal is just bringing him out.

(Pause in proceedings.)

THE COURT: You may swear Mr. Belfield.

PAUL L. BELFIELD, Government's Witness, Sworn.

AUDIO OPERATOR: Please spell and state your name for the record.

THE WITNESS: Paul Lawrence Belfield, P-A-U-L, L-A-W-R-E-N-C-E, B-E-L-F-I-E-L-D.

DIRECT EXAMINATION

BY MS. MILLER:

Q Good afternoon, sir.

[34] A Good afternoon.

Q Sir, do you adopt your testimony at the trial of United States versus Harry Riddick as your testimony for purposes of this proceeding which is the sentencing of Amanda Mitchell?

A Yes, I do.

MS. MILLER: I have no other questions, your Honor.

THE COURT: Mr. Morley.

CROSS-EXAMINATION

BY MR. MORLEY:

Q Good afternoon, Mr. Belfield. My name is Steve Morley. I represent Amanda Mitchell. I just have a few questions for you.

A Okay.

Q You were delivering drugs for Harry Riddick starting when, sir?

A I didn't deliver drugs for Harry Riddick. I sold drugs at Phill's Bar and Grill for Harry Riddick.

Q You sold drugs for him?

A Yeah.

Q Okay. And when did you start doing that, sir?

A In may of '92.

Q May of '92. Between the end of '91 and May of '92, what was your relationship with Harry Riddick?

A I've been knowing Harry all—approximately all my life, and—

[35] Q Did you see him delivering—having a drug organization in that period of time?

A Yes, I did—

Q Okay.

A —at Phill's Bar and Grill.

Q At Phill's Bar and Grill?
A Yeah.
Q Okay. And when did you first notice that—that drug business going on out of Phill's Bar and Grill?
A '91 when I got out of prison.
Q When did you get out of prison, sir?
A I got out of prison in '90, but I stayed in the house till early '91.
Q Okay.
THE COURT: You were in prison in Carlisle, is that right?
THE WITNESS: Yes, Cumberland County.

BY MR. MORLEY:

Q Okay. And that was a drug case, right?
A Right.
Q Okay. So you say late '91 is when you first started noticing the drug business going on at Harrys?
A Early '91, early, yeah.
Q Early '91, okay. And you testified at trial that in a time period, late '91, early '92, is when you first saw [36] Amanda Mitchell?
A True.
Q Okay. What I'm trying to pin down, sir, is when in '91 you think you saw her and how you would recall that date?
A I seen her coming in Phill's Bar and Grill when I was just hanging in there, going in there buying small packages of cocaine. And I'd be in there late at night, and I'd see her come in there, giving Harry the pagers and the walkie-talkies that she was using at that time.
Q Okay. You'd see her come back with that—and you say that's late '91?
A Yeah.
Q Late '91, you mean December, '91?
A Somewhere, December, the quarter, last quarter of '91.

Q Okay. How would you know—how do you know it was that time, sir? Did you keep a calendar?
A No, I didn't keep a calendar, no.
Q Okay. Could it have only been as early as January, '92, that you saw her doing that?
A Could have been.
Q Okay.
A Could have been.
Q So basically you're saying late '91, early '92. You're not real sure of the time frame. It may have only started in early '92?
[37] A This could be true, yes.
Q Okay.
MR. MORLEY: I have no further questions. Thank you, Judge.
THE COURT: Do you have any questions?
MS. MILLER: I have no questions, your Honor.
THE COURT: Mr. Belfield, you may step down and be remanded to the marshals.

(Witness excused.)

THE COURT: Mr. Morley, do you have any other witnesses you want to call?
MR. MORLEY: No, Judge.
THE COURT: Are you—your client should—especially in a factual context like this, your client—she may testify if she wishes, but she may remain silent. In either event, whether she wishes to testfiy or not, she may address me prior to my imposing sentence on her, after you've made a closing argument to me.
MR. MORLEY: Thank you, Judge.
THE COURT: You may confer.

(Pause in proceedings.)

MR. MORLEY: Judge, I have no evidence to present at this time, or—so this is my time to present evidence, I have no time to present—no evidence to present. I have argument to make on the issue of quantity and on—as

well [38] as on the more general issues--sentencing issues in this case.

THE COURT: Well, let's start with the Government. Do you have any argument you want to make?

MS. MILLER: Yes, sir.

Sir, it is perhaps not so much argument because the Government will not repeat the matters that are in its sentencing memorandum unless the Court has questions about any one of the three or so issues that were addressed, whether it be drug—

THE COURT: You might not make 15 kilos—

MS. MILLER: Yes, sir.

THE COURT: —depending on how you slice some of the factual issues. For example, Mr. Thompson I think testified that she was doing it in '94 for two to three months, and I believe the probation officer's calculations were three months.

MS. MILLER: Right.

THE COURT: So even supposing round that out to ten weeks, and—and the other evidence was that there was two ounces three times a week—it was one and a half to two ounces, two to three times a week. The probation officer used two at three times, makes six ounces a week.

Supposing he'd used four ounces—two ounces two times a week or four ounces a week for the—and suppose you [39] make it 50 weeks instead of 52 weeks, (inaudible) weeks instead of 38.7 weeks, you're still at—I have 13.—plus kilos.

So I don't see that I have much leeway in this instance.

MS. MILLER: Yes, sir.

THE COURT: I need to talk to Mr. Morley about that.

MS. MILLER: Yes, sir.

THE COURT: I don't think there's any need for you to show over 15 kilos, although the probation officer has in his report—

MS. MILLER: Yes, sir.

THE COURT: —15 kilos to Amanda Mitchell. I think it's probably something under 15, and that would make a difference if we were under Guideline Sentencing. But under the mandatory minimum, it only makes a one-month difference.

MS. MILLER: That is correct, sir. So, yes, you're not going to hear me give you a detailed analysis on that point.

The Government's position is that while the presentence report calculations were correct, if the Court gives Miss Mitchell—shaves off down to the—even below the most conservative estimate that can be found on these facts, the Court will still be at somewhere between at least five kilograms but less than 15 kilograms, which would be a [40] level 32. And it is the Government's position—

THE COURT: That would—and that's 96 months by my calculations?

MS. MILLER: Correct, correct.

THE COURT: But the 120-month minimum mandatory would take over?

MS. MILLER: That is correct, your Honor.

THE COURT: Is that right, Mr. Miller?

PROBATION OFFICER MILLER: Yes, your Honor. But the safety valve may be applicable in this particular case, your Honor, in regards to Count 2 in the 120-year—the 120-month statutory minimum.

THE COURT: Okay.

MS. MILLER: Your Honor, under—if I may briefly address that provision, your Honor. When the Probation Office stated in the presentence report that Section 5(c)1.2 might apply to this case, the Probration Office had no information available—probation officer had no information available to him at that point as to what exactly Miss Mitchell—what information she was or was not providing about the offense of conviction.

THE COURT: Am I—was this an open plea or were there overtures of cooperation?

MS. MILLER: No, sir. This was simply an open plea.

THE COURT: Cooperation was never an issue in this [41] case?

MS. MILLER: That is correct, your Honor.

THE COURT: Okay. But to get the safety valve, she must make a—must come forward and tell you her involvement in the situation?

MS. MILLER: Yes, sir.

THE COURT: Was that done?

MS. MILLER: Mr. Morley wrote the Government a letter asking—stating that Miss Mitchell was willing to sit down and talk to the agents. However, at the point that that letter was received, Mr.—Miss Mitchell had already filed objections to the presentence report, stating that her position was, and is, that the only delivery she ever made to Harry Riddick were three deliveries to Alvita Mack.

THE COURT: You mean made for Harry Riddick?

MS. MILLER: Right.

THE COURT: You said to.

MS. MILLER: I'm sorry. Yes, for Harry Riddick.

MR. MORLEY: That misstates our position, Judge.

MS. MILLER: Sir, it's in writing. It's right in his objections that her involvement with Harry Riddick is limited to three deliveries to Alvita Mack. It is stated very clearly in his objections.

Realizing that that was her position that she was going to come in and say, "I sold three times to Alvita Mack. [42] That's all I know," the Government did not see any point to having her come all the way in to sit down and tell us that.

THE COURT: Well, and again, there was really no evidence to counteract your—she didn't take—we don't hold this against her for not testifying in her behalf, of course.

MS. MILLER: Correct.

THE COURT: But there is no evidence from her side of the table since she was only—there's no sworn testimony subject to cross-examination that she was only involved in three—

MS. MILLER: Correct.

THE COURT: —incidents.

MS. MILLER: That is correct.

The Government's position, your Honor, is that Miss Mitchell has made it clear that her offer to sit down and, "Tell everything she knows," is by her own position, limited to what she claims are her deliveries to Alvita Mack.

THE COURT: Is it too late for her to do that in your view—to testify now?

MS. MILLER: Sir, she is here to be sentenced before this Court, and the Government's position is that yes, it is too late. She is here to be sentenced, and, yes, it is too late.

This position was not designed for defendants who [43] push it right up to the threshold and say, well, well, now—

THE COURT: But she pleaded guilty to—

MS. MILLER: Yes, sir.

THE COURT: —conspiracy.

MS. MILLER: Yes, for which she gets the three-point reduction—

THE COURT: That's right.

MS. MILLER: —which is what the Guidelines anticipate. But at this point, your Honor, yes, this is—

THE COURT: Okay. I don't think you can take the position that she forced the Government to trial—that she —she tendered, proffered her plea at the last minute. She didn't do that.

MS. MILLER: No, sir.

THE COURT: What she's done is, she hasn't come forward until the last minute, even to now, she hasn't come forward and told you what her involvement is (inaudible).

MS. MILLER: That's correct, sir.

And the Government submits that 5(c)1.2 was not designed for this type of defendant.

THE COURT: Let's read into the record the exact provision of the Guideline. Do you have—I have it here if you don't.

MS. MILLER: Yes, sir. Do you wish the Government—

[44] THE COURT: Yes.

MS. MILLER: —do you wish me to do that?

THE COURT: Would you read it in—

MS. MILLER: Certainly.

THE COURT: —so we know what we're talking about?

MS. MILLER: Okay. With the Court's indulgence.

5(c)1.2 reads that, "In the case," in pertinent part reads that, "In the case of an offense under 21 USC Section 846," which would be the operative section for Miss Mitchell, "the Court shall impose a sentence in accordance with the applicable Guidelines without regard to any statutory minimum sentence if the Court finds that the defendant meets the criteria in 18 United States Code Section 3553, Subsection F, Sub-subsections 1 through 5 set forth verbatim below."

And the subsection that is at issue in this case because the Government agrees that the first four do apply is Subsection 5, "Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.

"But the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the Court that the defendant has complied [45] with this requirement."

And the Government submits that the Government is already aware of very substantial information that the defendant is not willing to provide at this point.

Thank you, sir.

THE COURT: Mr. Morley?

MR. MORLEY: Yes, sir.

Your Honor, I would like to just clarify a couple of things that I believe were not stated correctly.

First of all, regarding Miss Mitchell's desire to meet with the Government, it was the—it was not that it was too late in the game to do so. In fact, we scheduled an appointment with the case agent to do that. Miss Mitchell asked that I—Miss Mitchell has concerns about her physical safety, and, therefore, asked that I cancel that and so we did not pursue that. It was not done because we pushed the Government to the limit—

THE COURT: Right. Well—

MR. MORLEY: —pushed every button to the limit. Unfortunately, she—

THE COURT: Unfortunately, it wasn't done.

MR. MORLEY: It was not done. She has made a decision for that reason.

THE COURT: I think the good argument can be made to push the quantities under the 15 Kilogram level.

[46] MR. MORLEY: So that's number one. Number two—

THE COURT: If you could do that, you bring it down to 96 months, 97 months, and then you eliminate the 120-month mandatory minimum, if you qualify.

MR. MORLEY: I understand, Judge.

Additionally as regards our position in writing regarding quantities on the PSI, it was our position that the three deals that are—the three deliveries that were made to Alvita Mack that were enumerated in the—in the indictment, where clearly—she is clearly responsible for those, and that comes to a total of about 58 grams.

She also on a regular basis delivered gram quantities, less than gram quantities, for—to share personally with

Alvita Mack, and the two of them would do drugs together. And that, of course, would constitute delivery, but it is part of our—what we stated to the—in the PSI objections.

THE COURT: Okay. There's very substantial evidence that she was doing this.

MR. MORLEY: I understand, Judge.

THE COURT: (Inaudible) on a routine basis.

MR. MORLEY: Judge, I would ask you—

THE COURT: And I think you can argue about the quantities—

MR. MORLEY: Judge—

[47] THE COURT: —you can argue about how many times a week she did it, but it's pretty clear she was doing it on a weekly basis.

MR. MORLEY: Judge, I would ask you to sentence her in accord with the three transactions for which we really know that she was involved, a quantity of about 28 grams, about 58 grams. The reason I ask you to do that is not that she was not at all involved, and, therefore, you should absolve her from all other involvement.

Rather, that to determine her involvement, her usage, her delivery during the time period of '92 to '94 is at this juncture purely conjectural. We are really into guesswork.

And while the Third Circuit says your Honor can extrapolate, I do not think that they mean that you can—I think the Third Circuit allows you to extrapolate drug quantities from a foundation. And I think this case presents a foundation that is far from solid.

We have the testimony of Richard Thompson who, for the first time, never at trial, never in his proffers, brings the matter of Amanda Mack's—Amanda Mitchell's involvement into—through '93 and into '94. That has never been cited prior to today's hearing.

THE COURT: Well, she wasn't on trial.

MR. MORLEY: She wasn't on trial, but his proffers [48] make no mention of that either. And I suggest to the Court that—

THE COURT: Well, we know—

MR. MORLEY: Mr. Thompson's testimony should be suspect.

THE COURT: —that you can never have absolute conformity between the proffers and the proof at trial, and that defense counsel use that in every case—

MR. MORLEY: I agree, Judge, but—

THE COURT: —to undermine the credibility of the witnesses against their—

MR. MORLEY: Precisely, and I'd ask you to make a credibility finding in this case that Mr. Thompson's credibility as to Miss Mitchell's involvement is just not substantial enough to warrant sentencing in accordance with his statements. I think his credibility is sufficiently undermined, his own self-interest and his lack of prior statements, and he did testify at trial.

If he had not mentioned Amanda Mitchell at all during trial, then I think the argument could be made, "Well, Amanda Mitchell wasn't on trial, therefore, they didn't need to elicite any testimony about her." But questions were asked specifically about other people to elicit Amanda Mitchell, who was not on trial. Therefore, you have two instances in prior statements where he did not mention her involvement, [49] never made any mention of her involvement as being a supervisor in '94.

THE COURT: There's no—there's no enhancement for supervision.

MR. MORLEY: I understand that, but it's still his credibility as to that.

THE COURT: I don't—I find as a fact that she was not a supervisor in the Riddick organization, and Ms. Miller did not suggest that she was. She—I think at one point, she may have had some minor supervisory role, but it's not enough to trigger any change—

MR. MORLEY: Well, that's, of course, if you attribute that testimony the first time ever from Mr. Thompson.

Again, we have Mr. Belfield who says he saw Amanda Mitchell doing this with radios and being around Phill's Bar late '91 into '92. Well, today, it could have been only as early as '92. He's not sure of the dates. So we're into '92, which is in conformance with her activities through that year. In April, August and November, she makes three discreet deliveries.

What is significant is, on the one hand, we have the testimony of Richard Thompson, Paul Belfield and—and Alvita Mack whose testimony at trial. But it's really Thompson and Belfield who pin her as being something of a [50] regular courier. And other than the testimony today of Mr. Thompson, it all ends in '92.

What is significant of that, Judge, is all this case. I have all these surveillance reports, Judge. They don't mention—and transcripts—they don't mention Amanda Mitchell in '93, in '94. They're not there. She is not mentioned.

THE COURT: What about the wiretaps?

MR. MORLEY: The wiretaps, other kinds of surveillance.

THE COURT: I don't think she was supervising. I don't think that she had a role to play other than to deliver to—to the purchaser.

MR. MORLEY: There were—there were tape recorded conversations of three times with Alivta Mack, and there was surveillance ongoing of this organization. I have all these DEA-6s, piles of them, of various surveillance. They don't mention watching and seeing Amanda Mitchell.

There is one tape recorded conversation with Alvita Mack in April of '93—with Alvita Mack, Amanda Mitchell and Alvita Mack, in April of '93, which is cited in the Government's memo to you. A reading of that reflects that Amanda—Alvita Mack is the one trying to

elicit drug information from Amanda Mitchell. And Alvita Mack is the one that is saying things about needing weight, and Amanda [51] Mitchell is saying, "No, they don't have that. They don't have that kind of weight."

And the only thing that's at all incriminatory that Amanda Mitchell says—she's saying, says, "Yeah, but what I'm saying is a lot of times they already got everything bagged up real small so they ain't got that together."

It's a reference to her knowledge of what goes on, and we concede that she knew what was goin on. She was making deliveries. But it's not like, "Oh, I can help you get something."

"Oh, you should call Lori," or "You should call Harry directly." There's nothing in here to acknowledge or in any way infer from this conversation that she has present—that would be April of '93—involvement.

The only corroborative evidence of Amanda Mitchell—

THE COURT: Oh, I'm sorry, excuse me, I made a mistake.

MR. MORLEY: The only corroborative evidence of Amanda Mitchell's involvement other than the words of —of Richard Thompson, who's, I suggest to the Court, is not worthy of this level of belief, is the tape recorded conversation she had and the deliveries she made to Alvita Mack. And this tape recording of her in April of '93, a year, you know, well, six months after the last delivery to [52] Alvita Mack, where she's not even sounding like she's involved—

THE COURT: Let me take a look—

MR. MORLEY: —knowledgeable, yes, but not involved.

MS. MILLER: May I see what counsel is showing the Court just so I know what's—

MR. MORLEY: This is the—I'm sorry. It's the April 11th, '93, transcript, the one you cited in your memo.

MS. MILLER: Well, actually, well, thank you. I'm going to ask the case agent to get the transcript that was actually used at trial, your Honor, because what counsel is showing you is a very rough draft. And the transcript of the tape that was actually played at trial was a lot easier to follow.

MR. MORLEY: It's the only copy I have, Judge.

(Pause in proceedings.)

THE COURT: And the confidential informant was?

MR. MORLEY: Alvita Mack.

MS. MILLER: Alvita Mack.

THE COURT: It was Alvita Mack, right? Yes, I remember this. And it was Lori who was the confidential—was the case—was the undercover agent, is that right? Do I have it right? She's referring to a Lori in this tape. This is not—

[53] MS. MILLER: She's referring to Lori Hottenstein.

THE COURT: Oh, you're right, you're right. You're right.

(Pause in proceedings.)

THE COURT: And your point here is that she's not involved in this?

MR. MORLEY: My point is that she is knowing, she knows what goes on, but she's not saying anything about how she can help get deliveries, how she knows—how she can, how she's delivering. She makes no reference to her own involvement. She's clearly knowledgeable. We've never denied that she's not knowledgeable.

THE COURT: It follows—as a courier, it appears to me like she's being doing it on an ongoing basis.

MR. MORLEY: Not according to this transcript, Judge. I mean, according to the words of Richard Thompson and Paul Belfield, yes. But I think those words are suspect.

THE COURT: There's nothing in this transcript that talks about her being a courier or delivering drugs—

MR. MORLEY: Correct.

THE COURT: —at the time of this conversation.

MR. MORLEY: Correct.

THE COURT: And there may be a—she may—there may be a reference to a scarcity of the product if I'm reading this correct. It's a little hard to follow.

[54] MR. MORLEY: The way I read that—

THE COURT: But, I mean, that doesn't exonerate your client.

MR. MORLEY: Well, I only bring it up because, Judge, the Government present it in their memo as evidence of her involvement in April of '93. And I suggest to the Court that this tape does not show her to be involved in April of '93. It shows her to be somebody who knows about the situation, but does not show her to be a courier or involved in it at that time.

I think the Government's conclusions that it seek to draw from this tape far overreach the words in the tape itself. That's the point of that tape.

And other than that, we don't see or hear about Amanda Mitchell in spite of surveillance, in spite of all kinds of other kinds of wiretaps, Alvita Mack going out tape—with wires. We don't hear or see from her other than the three transactions and concededly, she goes and delivers and shares with people because she's a user at that time, and so she's delivering and sharing.

As far as the testimony of Belfield and Thompson, they lend credibility to the fact that she was a courier. The question I have that sets at the core—heart in this is how can we extrapolate the quantity of drugs when we are not sure about the time frame she did it in, when it's purely [55] speculative, when Mr. Thompson is the only person who puts her involved after November of '92.

Mr. Thompson's own testimony is that he really wasn't seeing what was going on for chunks of time. It is simply not the foundation upon which your Honor can faithfully extrapolate.

I suggest to the Court that in order to be safe in this case, we should stick with what we know to be true. We know that she delivered 58 grams. We know that means she will serve at least a year in jail.

And I think what we have is a 44-year-old woman, never been arrested before in her life. She has been hard working. Ever since her arrest in this case, she has been basically at the same job.

She has come to court today with a number of aunts and friends and her daughter and her sister and her brother—a brother and her couple of aunts. They are here to show the kind of support and family she comes from, that she got into this at a time when she was using drugs on her own. Primarily, she got into doing some selling in order to help feed her own addiction at the time.

She got out of using drugs on her own. She is away from that, and she is very glad to be away from that. She understands she has to go to jail. She understands that she did something wrong and she needs to be punished.

[56] The question for the Court is how much punishment is appropriate in this case? And given the fact that we have to take somebody like Richard Thompson's word and push this to eight or ten years versus saying perhaps Mr. Thompson is right, but the Government hasn't proved by a preponderance of the evidence that he is correct.

Given the person that I have at the bar of the Court, perhaps the best solution is to sentence in accordance with what I know to be true. What I know to be true is two ounces, and perhaps that is under—underselling it, but in this case, that may be all that is necessary to deter her future conduct, adequately punish and—and resolve the Government's needs in this case.

She is willing and has always been willing to plead guilty in this case. She did so without putting the Government to the test. What she seeks in this case is to be

punished for that which we know to be true, not speculation and extrapolation from shaky foundations.

And that's basically the position we're taking, Judge, not that she is an innocent who delivered only those three times but rather, that the proof of her other deliveries is not sufficient to meet the Government's burden of proof in this matter. And, therefore, we should sentence in accordance with the lower proof.

THE COURT: Isn't the rule that once she pleads [57] guilty, then the—her duty to remain silent no longer pertains?

MR. MORLEY: Judge, my understanding—

THE COURT: I mean, what troubles me here is that she hasn't come forward, been sworn, and told us—or ever told the Government what her involvement is in this instance. And I think the—from where I sit—it looks like she was a courier on a routine basis, and if we modify the figures, extrapolate them more along the lines of taking minimum or conservative amounts, well over five kilograms, I don't really see that I have much leeway.

MR. MORLEY: Judge, I think if you reject Richard Thompson's testimony or reject his testimony as regards '93 and '94 as just not credible and leave it at '90—

THE COURT: Yes, but—

MR. MORLEY: —at about nine months in '92—

THE COURT: —there's only one problem with that. I don't think it is not credible. I mean, I think—I think that she was a courier for this period of time. I think if you use two days a week for a year and a half at two ounces a shot, you're over five grams, five kilograms.

MR. MORLEY: I understand that, Judge. I'm asking you—

THE COURT: Not even counting '94.

MR. MORLEY: I ask you to take a look at the [58] testimony and look at what Mr. Thompson has at stake and look at what his interests in this case are and to determine that—

THE COURT: He testified—he and Belfield testified —they're career criminals.

MR. MORLEY: And he also testified—and Belfield testified he was using cocaine at the time. I mean, so how good is his memory?

THE COURT: But the problem is their testimony fits the wiretaps and the rest of the evidence that we heard at great length—

MR. MORLEY: I understand that.

THE COURT: —rather completely.

MR. MORLEY: Which wiretaps don't relate at all to Miss Mitchell in terms of even mentioning her.

THE COURT: I don't think she was—Miss Mitchell was involved with Miss Riley except Miss Riley saw her at Phill's Bar under circumstances that would suggest she was selling cocaine.

MR. MORLEY: Although Miss Riley retracted that today, your Honor. She—

THE COURT: Well, no, she said—

MR. MORLEY: —she said I didn't know what she was doing.

THE COURT: —I can't tell what she was doing in [59] there, but her actions are consistent with being a seller of cocaine.

MR. MORLEY: Or a purchaser of cocaine.

THE COURT: Or a purchaser.

MR. MORLEY: Or a purchaser. And—

THE COURT: Well, a purchaser wouldn't be within the—I don't think would be within the ambit of the conspiracy.

MR. MORLEY: Well, there are two things. Purchasing is not within the ambit of the conspiracy, number one. Number two, even if she is a seller in Phill's Bar, there's nothing to show that she was selling cocaine for this conspiracy. In other words, it could have been her—getting some cocaine for her own use, selling a little bit to be able to make another purchase.

THE COURT: She (inaudible) purchase, she was a conspirator in the Riddick conspiracy.

MR. MORLEY: Right. Judge, we have no problem with that because the Alvita Mack deliveries are within the Riddick conspiracy.

THE COURT: Okay.

MR. MORLEY: So we're not—we're not disputing that. I just don't think Shannon Riley's testimony goes to anything in this case as far—regarding Amanda Mitchell. She has not come forward, Judge, to talk to the Government because she is scared. And it's always been my position that [60] the defendant is the best judge of the realities of that fear.

THE COURT: Then if she's more afraid of those people than she is of the Sentencing Guidelines (inaudible.)

MR. MORLEY: And as far as her obligation to testify after she pleads guilty, I think that—I think she retains her Fifth Amendment privilege through sentencing. But—

THE COURT: Well, if I'm wrong—and let the record—you may want to take that up because I believe that under—once she pleads guilty, it's my understanding—or am I wrong in that, Attorney Miller?

MS. MILLER: I'm sorry, sir?

THE COURT: I believe that once a criminal defendant in a felony charge pleads guilty, then that defendant does not—no longer has a Fifth Amendment right to remain silent.

MS. MILLER: Yes, sir, with—with respect to the—

THE COURT: It's the sort of things we mention—say that you're giving up your—

MR. MORLEY: Right.

THE COURT: —right to be silent. You may be questioned about this proceeding by the Judge?

MS. MILLER: Yes, sir. But it is the Government's position that that is true with respect to the offenses to [61] which she pled guilty.

THE COURT: And let's get that tested. I think that if I—I think that in—in rejecting your argument that I should reject the Belfield/Riley/Thompson testimony. One of the things that I am basing on that is her not testifying to the contrary. So there you have it. If I'm wrong, surely we'll have her resentenced.

MR. MORLEY: Okay. One moment, Judge.

THE COURT: Yes. You need to find out whether she wants to address me without being subject to cross-examination before I impose sentence.

MR. MORLEY: That—

THE COURT: Before you do that, let Ms. Miller reply to anything just said.

MS. MILLER: Yes, if I may briefly, your Honor. Very briefly, Judge, on the issue of drug quantity.

As the Court knows, the standard here is preponderance of the evidence. As the Court has noted, there is sworn testimony that is very, very substantial before the Court that far exceeds that burden, and counsel has produced absolutely nothing to undermine that testimony. And it has been corroborated.

And basically, the Court would have to find that these witnesses are incredible and throw out all their testimony in order to find that their testimony with respect [62] to Miss Mitchell was unreliable for some reason that counsel has not presented.

Under *United States versus Polino* (ph), the Third Circuit precedent for this circuit, the Court must look at exactly the kind of testimony we received here today. In *Polino*, there was a member of a conspiracy who testified to the frequency and the average amount of cocaine sold by a certain defendant, and the *Polino* Court indicated that is precisely the kind of reliable testimony concerning average amounts and time periods on which a sentencing Court can rely to estimate amounts of drugs that have never actually been seized by a law enforcement agency.

So the Court, to adopt counsel's argument, basically the Court would have to find that you can never sentence a defendant to anything except the drugs that were actually seized from him or that an undercover agent actually purchased, that the Court would always be confined to that.

And the Government submits that even under the most conservative estimate, taking two ounces per day, cutting out almost everything—

THE COURT: Changing it from three times a week to two times a week.

MS. MILLER: Right. Shaving it to two times a week to one and a half ounces per day and ignoring the fact that sometimes there would be more cocaine than that, even so, [63] Judge, we're still coming up with 18.4 kilograms of cocaine. The bottom line is it's way over five kilograms, and counsel has presented nothing to cast any doubt on that.

One point with respect to the issue of the escape clause, 5(c)1.2—

THE COURT: He doesn't seek the escape clause.

MS. MILLER: Judge, there's just—

THE COURT: There's no—there's no claim by the defendant that it applies.

MR. MORLEY: I agree, Judge. We're not claiming it.

THE COURT: She has—they admit that she—it was admitted that she does not wish to do that for fear of her own personal safety.

MS. MILLER: Judge, the Government would just state for the record there is no evidence on this record that her safety has been implicated in any way. And until counsel proffers some evidence to show other than—other than verbal proffer by counsel without any evidence that there was ever any threat to her—

THE COURT: It's not—he's not—she's not claiming the escape clause.

MS. MILLER: Just for the record, Judge, there's been no evidence of fear for safety on this record.

THE COURT: Is there anything else—

MS. MILLER: Thank you, sir.

[64] THE COURT: —you wish to call to my attention?

MS. MILLER: No, sir. Thank you.

THE COURT: Does your client wish to address me or remain silent?

MR. MORLEY: Could she do it from here, Judge?

THE COURT: Of course.

MR. MORLEY: Thank you.

THE DEFENDANT: My name is Amanda Mitchell. I know for a long time I used drugs. I did a lot of things I—to get drugs.

I'm thankful to be alive today, from getting away from drugs. I changed my whole life totally around, and—I just got away from it. I got too involved with doing drugs. And as much drugs as I did, I couldn't have did all the other things. That's all I have to say.

MR. MORLEY: Judge, I have nothing to add. I think the issues are clear.

The COURT: Okay. I'm sad for you, Miss Mitchell. You seem to have made a lot of progress. You've been on pretrial supervision, and there have been no incidents that I know about.

The problem is it's pretty clear you were a courier for two to three years, and that by delivering small quantities, it adds up to more than five kilograms. Once it adds up to five kilograms, your sentence is 120 months, and I [65] can't do much about that. I could—I could beat that by branding Riley, Thompson and Belfield liars, but I don't think they are liars. I think they were substantially accurate.

I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. And if I made a mistake legally in that because in the United States, we have this principle that no defendant may be compelled to be a witness against herself.

And at the guilty plea, you and your counsel reserved the right to have the Government prove by a preponderance of the evidence the amount of cocaine that you were involved with as related to the offenses you pleaded guilty to. I'm taking the position that you should come forward and explain your side of this issue.

Your counsel's taking the position that you have a Fifth Amendment right not to. If he's right in that, and I believe he's—he's protecting the record so that there

may be an appeal here. And I advise you that you have a right to appeal. If he's—if it's determined by a higher Court that he's right in that regard, I would be willing to bring you back for resentencing. And if you—if—and then I might take a closer look at the Belfield/Riley/Thompson testimony.

But without anything from you and with my understanding of this Riddick cocaine organization, I think [66] you were involved in more than five kilograms of cocaine. Therefore, you're sentenced—but I don't think it was 15. My calculations are 13. —I have about 13 kilograms plus. I have 3.3 kilograms in '94, 5.6 kilograms in '93, and 3.9 kilograms in '92.

And that will trigger 120 month sentence, so you're sentenced to the custody of the Attorney General for 120 months. You're directed to report to the institution on August 1st—

MS. MILLER: Your Honor.

THE COURT: Yes?

MS. MILLER: I'm very sorry to interrupt the Court, but under 18 United States Code, Section 3143, it is, in fact, mandatory for the defendant to be remanded at this time.

THE COURT: You're right. The presentence report suggested that she was a good candidate for self-surrender, but I think you're right.

MS. MILLER: Unfortunately, it is mandatory.

THE COURT: I think you're right. So you'll be taken into custody today. But your—I won't—in light of the fact that I think your sentence is harsh under the mandatory minimum, I impose no fine.

I place you on supervised release for a period of six years upon your release with instructions for drug [67] testing at the option of the Probation Office.

Your special assessment of $200 is imposed, and this sentence is imposed on Counts 2, 11, 21 and 28 to be served concurrently. You're to report to the Probation Office within 72 hours after your release from incarceration.

Mr. Miller, is there anything in the sentencing that's been omitted?

PROBATION OFFICER MILLER: No, your Honor.

MS. MILLER: Not from the Government, your Honor.

THE COURT: All right. And you may take Miss Mitchell into custody to begin serving her sentence.

(Proceedings concluded at this time.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case Number: 2:94CR00159-14

UNITED STATES OF AMERICA

v.

AMANDA MITCHELL

(For Offenses Committed On or After November 1, 1987)

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

[X] pleaded guilty to count(s) 2, 11, 21, 28.

[ ] pleaded nolo contendere to count(s) _____ which (was) (were) accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title/Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Distribute Cocaine.	03/01/94	2
21 USC § 860(a)	Distribute Cocaine Within 1000 Feet of a School.	04/09/92	11
21 USC § 860(a)	Distribute Cocaine Within 1000 Feet of a School.	08/12/92	21
21 USC § 860(a)	Distribute Cocaine Within 1000 Feet of a School.	11/11/92	28

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ———— and is discharged as to such count(s).

[ ] Count(s) ———— (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
247-94-6468

Defendant's Date of Birth:
07/29/51

Defendant's Mailing Address:

539 N. Fountain Street
Allentown PA 18102

Defendant's Residence Address:

539 N. Fountain Street
Allentown PA 18102

07/02/96
Date of Imposition of Judgment

/s/ Edward N. Cahn
Signature of Judicial Officer

EDWARD N. CAHN
Chief Judge
Name & Title of Judicial Officer

07/02/96
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months.

120 months on Count(s): 2, 11, 21, 28

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ——am/pm on ————.
[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
[ ] before 2:00 p.m. on ————.
[ ] As notified by the United States Marshal.
[ ] As notified by the probation office.

cc: Def
Def Atty
U.S. Atty-Barbara Miller
Probation-Donald Miller
U.S. Marshal(2)
Pretrial

RETURN

I have executed this judgment as follows:

———————————————

———————————————

———————————————

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 6 years.

6 years as to Count(s): 2, 11, 21, 28

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

The defendant shall be tested for drug use at the direction of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer.
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal

history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	Assessment	Fine	Restitution
2	$ 50.00	$ .00	$ .00
11	$ 50.00	$ .00	$ .00
21	$ 50.00	$ .00	$ .00
28	$ 50.00	$ .00	$ .00
Totals:	$200.00	$ .00	$ .00

FINE

The fine includes any costs of incarceration and/or supervision.

[X] The court has determined that the defendant does not have the ability to pay interest in full. It is ordered that:

[X] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[X] in full immediately.

[ ] in full not later than ————————————.

[ ] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $———— over a period of —— months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

STATEMENT OF REASONS

[ ] The Court adopts the factual findings and guideline application in the presentence report.

OR

[X] The Court adopts the factual findings and guideline application in the presentence report except

The court determines that the amount of drugs attributable to the defendant to be 13.5 kilograms.

Guideline Range Determined by the Court:

Total Offense Level: 30
Criminal History Category: I
Imprisonment Range: 97 to 121 months and —— months consecutive.
Supervised Release Range: —— to 6 years
Fine Range: $1,500.00 to $10,000.00

[X] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $————

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the sentence is imposed for the following reasons(s):

The sentence is a mandatory 10 year minimum.

OR

[ ] The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

Filed September 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1605

UNITED STATES OF AMERICA

v.

AMANDA MITCHELL,
aka AMANDA FOSTER

AMANDA MITCHELL,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 94-cr-00159-14)

Argued July 17, 1997

Before: SLOVITER *Chief Judge*, ROTH and
MICHEL,* *Circuit Judges*

(Opinion Filed September 9, 1997)

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* Hon. Paul R. Michel, United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION OF THE COURT

SLOVITER, *Chief Judge*.

This appeal by Amanda Mitchell, who pled guilty to engaging in a conspiracy to distribute cocaine, raises an issue of first impression for this court, namely, whether a criminal defendant who pleads guilty to distributing cocaine but reserves the right to contest the amount of cocaine for which she should be held responsible has a Fifth Amendment right not to testify during sentencing.

I.

Mitchell and twenty-two other defendants were indicted for their roles in a cocaine conspiracy conducted between 1989 and March 1994, in Allentown, Pennsylvania. According to the indictment, defendant Harry Riddick led the conspiracy, purchasing large quantities of cocaine from various suppliers and selling the cocaine on a daily basis through couriers and street sellers to whom he provided cars and pagers for this purpose. Phill's Bar and Grill was the headquarters for the distribution ring.

Mitchell was charged in Count 1 with conspiring to distribute five or more kilograms of cocaine in violation of 21 U.S.C. § 846 and in Counts 11, 21 and 28 for distribution of cocaine within 1,000 feet of a school or playground on three specific occasions in violation of 21 U.S.C. § 860(a). Under 21 U.S.C. § 841, the mandatory minimum sentence for a defendant convicted of distributing at least five kilograms but less than fifteen kilograms of cocaine is ten years imprisonment. The Sentencing Guidelines may then be used to increase the sentence above the statutory minimum as high as life imprisonment if it is determined that defendant sold a greater quantity of drugs or had a greater role in the conspiracy. In this case, Mitchell's mandatory minimum sentence fell within

her Guidelines range, which was 97 to 121 months imprisonment.

On October 16, 1995, Mitchell entered an open plea of guilty, i.e., her plea was not premised on a plea agreement, to all four counts but reserved the right to contest the quantity of cocaine which she distributed. During the plea colloquy the district judge sought to ensure that Mitchell understood her rights. The judge began by stating that Mitchell had been charged with distributing more than five kilograms of cocaine, but after Mitchell's attorney reminded the judge that she did not accede to the amount of drugs at issue, the judge agreed that the quantity would be determined at sentencing.

The district judge then told Mitchell of the possible range of punishment she was exposing herself to by pleading guilty. The judge noted that "the range of punishment here is very complex because we don't know how much cocaine the Government's going to be able to show you were involved in," app. at 1305, and then deferred to the Assistant United States Attorney for her explanation of the possible punishment. The government lawyer stated:

> Ms. Miller [AUSA]: On Count 2, Miss Mitchell faces a mandatory minimum of ten years up to a maximum of life imprisonment, a maximum fine of $4 million, a mandatory minimum of five years up to a lifetime supervised release, and a $50 special assessment.
>
> On each of Counts 11, 21 and 28, Miss Mitchell faces a mandatory minimum of one year imprisonment up to a maximum of 40 years imprisonment, a maximum fine of $2 million, a mandatory minimum of six years supervised release up to lifetime supervised release, and a $50 special assessment.
>
> On all counts, Miss Mitchell would face a total of a mandatory minimum of ten years up to a maximum of lifetime imprisonment, a $10 million fine, a mandatory minimum of six years up to lifetime supervised release, and a $200 special assessment. That would be on all counts.

> The Court: Okay. Now, the penalties you just set forth, Ms. Miller, assume there's a five-kilogram involvement?
>
> Ms. Miller: That's correct, sir.
>
> The Court: So those are the penalties if the Government can prove that you [Mitchell] were involved in five kilograms of cocaine distribution. Your lawyer says you're not, is that right?
>
> Mr. Morley [Mitchell's Attorney]: That's correct, sir.
>
> The Court: So if you're not, then the penalties would be less.

App. at 1306-07.

Before accepting her plea, the district court stated that: "I find that there is a factual basis for the plea. I find that you understand your pretrial rights, your trial rights. I find that you understand as well as it can be understood the range of punishment to which you're exposing yourself including imprisonment." App. at 1322. The court also explained that Mitchell would be waiving her rights by pleading guilty, including specifically her Fifth Amendment right not to testify. App. at 1314. Mitchell then pled guilty.

Thereafter, in January 1996, the case against nine of Mitchell's co-defendants went to trial. Much of the trial testimony focused on Riddick's management of the cocaine operation. However, several of Mitchell's co-defendants who had pled guilty and agreed to cooperate with the government testified that Mitchell was one of Riddick's regular sellers. Shannon Riley testified that she often saw Mitchell at Phill's Bar going into the bathrooms in order to sell cocaine.

Paul Belfield testified that he regularly sold cocaine for Riddick and that during 1991 and 1992 Mitchell delivered the cocaine to him. When asked how he would get in touch with Mitchell, Belfield stated that "I would beep Harry Riddick, then Amanda [Mitchell] would come by and deliver me the cocaine.' App. at 830. He testified that Mitchell used pagers and two-way radios that Riddick had given her for use in her cocaine deliveries.

Richard Thompson's testimony went directly to the issue of the quantity of cocaine involved. He testified that he worked two to three times per week selling at least two ounces of cocaine each day, that in April 1992, Riddick asked him to take Mitchell around and introduce her to Thompson's customers, and that she received a one and a half ounce bag of cocaine to sell two to three times per week. He stated that he saw Mitchell selling cocaine at this rate through December 1993. It is primarily Thompson's testimony that Mitchell seeks to undermine on appeal.

Mitchell's sentencing hearing took place on July 2, 1996. During the hearing Paul Belfield and Shannon Riley adopted their trial testimony and were cross-examined by Mitchell's counsel. The government also called Richard Thompson who adopted his trial testimony but also answered additional questions posed by the government about the specific amounts of cocaine that Mitchell had sold. Thompson testified that between April 1992 and August 1992 Mitchell worked two to three times a week selling one and a half to two ounces of cocaine each day, that between August 1992 and December 1993 she worked three to five times a week, and that from January 1994 through March 1994 Mitchell was in charge of distribution. On cross-examination, Mitchell's attorney elicited Thompson's concession that he did not see Mitchell consistently throughout this period.

The testimony of another trial witness, Alvitta Mack, was also adopted by both parties during the sentencing hearing. Mack had made a series of drug buys under the supervision of the DEA, and tape recorded some of the conversations. On several occasions Mack ordered a half ounce of cocaine from Riddick who sent his couriers, including Mitchell, to deliver the cocaine to Mack's house and collect the money. Mack testified as to three sales, consisting of a total of two ounces of cocaine. Mitchell argued that these three documented sales were the only reliable testimony as to the quantity for which she should be held responsible. However, Mitchell provided no evidence and did not testify to rebut the government's evidence about drug quantity.

At the close of testimony at the sentencing hearing, the district judge stated that he believed Mitchell no longer retained a right not to testify because she had pled guilty to the underlying offense and thereby waived her Fifth Amendment privilege. He explained that he also found credible the testimony that she was a courier during the period of time in question and that, even at the very least, her sales of two ounces two days a week for a year and a half put her over the five kilogram level. Thus, she was subject to the statutory minimum penalty of ten years.

The Court then entered into the following dialogue with the attorneys:

> Mr. Morley: And as far as her obligation to testify after she pleads guilty, I think that—I think she retains her Fifth Amendment privilege through sentencing. But—
>
> The Court: Well, if I'm wrong—and let the record—you may want to take that up because I believe that under—once she pleads guilty, it's my understanding—or am I wrong in that, Attorney Miller?
>
> Ms. Miller: I'm sorry, sir?

The Court: I believe that once a criminal defendant in a felony charge pleads guilty, then that defendant does not—no longer has a Fifth Amendment right to remain silent.

Ms. Miller: Yes, sir, with—with respect to the—

The Court: It's the sort of things we mention—we say that you're giving up your—

Mr. Morley: Right.

The Court: —right to be silent. . . .

* * *

And let's get that tested. I think that if I—I think that in—in rejecting your argument that I should reject the Belfield/Riley/Thompson testimony, one of the things that I am basing on that is her not testifying to the contrary. So there you have it. If I'm wrong, surely we'll have her resentenced.

App. at 1290-91.

Later the district judge told Mitchell that:

> I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. And if I made a mistake legally in that because in the United States, we have this principle that no defendant may be compelled to be a witness against herself.
>
> . . . I'm taking the position that you should come forward and explain your side of this issue.
>
> Your counsel's taking the position that you have a Fifth Amendment right not to. If he's right in that regard, I would be willing to bring you back for resentencing. And if you—if—and then I might take a closer look at the Belfield/Riley/Thompson testimony.

App. at 1295.

The district court then concluded that Mitchell sold 3.3 kilograms in 1994, 5.6 kilograms in 1993, and 3.9 kilograms in 1992 for a total of almost 13.0 kilograms. The court then sentenced her to the statutory minimum sentence of 120 months imprisonment, six years of supervised release, and a special assessment of $200.

II.

Mitchell raises two issues on appeal. First, she argues that the district court erred by refusing to recognize her Fifth Amendment right not to testify during sentencing. Second, she contends that the district court erred in finding that the government proved by the preponderance of the evidence that Mitchell had sold thirteen kilograms of cocaine.

A.

Fifth Amendment Claim

The Fifth Amendment to the United States Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself." This privilege protects a person's right to refuse to testify at trial, *see United States v. Frierson*, 945 F.2d 650, 656 (3d Cir. 1991), *cert. denied*, 503 U.S. 952 (1992), and to refuse to provide evidence that would lead to prosecution or be used against him or her in a criminal prosecution, *see Hoffman v. United States*, 341 U.S. 479, 486 (1951). The privilege also precludes the government or the court from penalizing a defendant in any way for the use of the privilege, *see Minnesota v. Murphy*, 465 U.S. 420, 434 (1984), and this encompasses a prohibition against comment on the exercise of the privilege at trial, *see Wilson v. United States*, 149 U.S. 60, 62 (1893).

On the other hand, if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege. *See Ullmann v. United States*, 350 U.S. 422, 431 (1956) ("if the criminality has already been taken

away, the amendment ceases to apply" (internal quotations omitted)). Once a defendant has been convicted of an offense, the privilege is lost because "he can no longer be incriminated by his testimony about said crime." *Reina v. United States*, 364 U.S. 507, 513 (1960).

Similarly, as we held in *Frierson*, a defendant who has pled guilty to the offense "waives his privilege as to the acts constituting it." 945 F.2d at 656; *see also United States v. Rodriguez*, 706 F.2d 31, 36 (2d Cir. 1983); *United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982). Of course, such a waiver will be effective only when the trial court has fully advised the defendant of the rights which the defendant relinquishes by such a plea.

Mitchell does not claim that she was not fully advised of the consequences of her guilty plea, including her forfeiture of the right to a jury trial and the right to remain silent under the Fifth Amendment. *See* app. at 1313-15. Nor does she contend that her plea was not knowing and intelligent. By voluntarily and knowingly pleading guilty to the offense Mitchell waived her Fifth Amendment privilege and stood before the court in the same position as if she had been convicted by a jury, a point the district judge emphasized. *See* app. at 1313.

In support of the proposition that she retained the right to invoke the Fifth Amendment in connection with her sentencing even though she had pled guilty, Mitchell cites three Third Circuit cases: *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976); *United States v. Heubel*, 864 F.2d 1104 (3d Cir. 1989); and *United States v. Frierson*, 945 F.2d 650 (3d Cir. 1976). In *Garcia*, we held that the district court could not condition lenity on a sentence following a guilty plea on the defendants' revealing the source of their supply of cocaine and helping the authorities clean up or stamp out the drug problem. We noted that defendants were offered no assurance of immunity, commenting "if either appellant had acceded to the sentencing court's request to reveal his source of supply of

cocaine, there was no guarantee that he would not be subsequently indicted for other acts not encompassed in the plea agreement." *Garcia*, 544 F.2d at 685.

Similarly, in *Heubel*, where we followed *Garcia* and held that a sentencing judge may not use a defendant's "failure to waive [the privilege against self-incrimination] as negative evidence to penalize him or her in deciding upon the appropriate sentence," *Heubel*, 864 F.2d at 1111, the basis for invocation of the privilege by the defendant who was charged with possession of cocaine with intent to distribute was "self-incrimination as to a potential conspiracy charge," *see id.* at 1106.

In *Frierson*, where we engaged in our most complete analysis of the issue of the assertion of the Fifth Amendment privilege in the context of sentencing, we held that "a denied reduction in sentence is a penalty in the context of Fifth Amendment jurisprudence," 945 F.2d at 660, but that Frierson had failed to claim the privilege "when asked during the sentencing process about acts beyond the acts of the offense of conviction," *id.* at 661. Therefore, the district court could properly deny him the two-level reduction for acceptance of responsibility because he had denied possessing a gun in his voluntary statements to the probation officer. Significantly, in *Frierson*, we pointed out that the questioning as to the gun "could produce information that would enhance [Frierson's] exposure to criminal liability in a state prosecution for unlawful possession of a dangerous weapon or the like." *Id.* at 657 (*citing Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 78 (1964)).

Thus, rather than support the proposition that a defendant who has pled guilty retains some Fifth Amendment right at sentencing as to the crime of conviction, all three cases on which Mitchell relies are merely examples of the general principle that just as a defendant retains her Fifth Amendment right as to offenses for which she has not yet been convicted, a defendant's plea

of guilty to one offense does not "by its own force . . . waive a privilege with respect to other alleged transgressions." *United States v. Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978); *see United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973).

We have not previously addressed the question whether a defendant retains a Fifth Amendment right after a guilty plea or conviction with respect to testimony that might negatively affect her sentence. The issue has most frequently arisen when one of several defendants seeks to elicit testimony from one or more of his co-defendants who have pled guilty but have not yet been sentenced. The courts have generally permitted the unwilling witness to assert the Fifth Amendment privilege not to testify. A careful reading of the cases shows that in most instances the courts have explained that the witness would have been at risk of prosecution on other offenses. *See United States v. De La Cruz*, 996 F.2d 1307, 1311 (1st Cir.) (noting that government, in cross-examining witness, could produce testimony that would inculpate him "not merely in the instant transaction but in other [drug] transactions"), *cert. denied*, 510 U.S. 936 (1993); *United States v. Mathews*, 997 F.2d 848, 851 n.4 (11th Cir.) (stating that "convicted, but not yet sentenced, defendant risks . . . additional prosecutions for related conduct"), *cert. denied*, 510 U.S. 1029 (1993); *United States v. Bahadar*, 954 F.2d 821, 824 (2d Cir.) (noting that witness remained subject to prosecution on open counts and therefore any testimony which he gave at defendant's trial could have been used as the basis for an upward departure at sentencing or "as evidence to support a prosecution on the two open counts"), *cert. denied*, 506 U.S. 850 (1992); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1075 (6th Cir. 1990) (stating that witnesses' "Fifth Amendment rights did survive their *nolo* plea as to the bank fraud charges because they remained vulnerable to further federal and state prosecution"); *United States v. Lugg*, 892 F.2d 101, 103 (D.C.Cir. 1989) (observing that other charges against witness remained which had not yet been dismissed); *Domenech*, 476 F.2d at 1229 (observing that Count 2 "still remained open against [witness] and his testimony . . . . could very well have further incriminated himself on that offense").

Because of the context in which these cases generally arose, i.e., the witness from whom the defendant sought to compel testimony had not been sentenced while the trial proceeded as to the non-pleading defendants, language in the cases commenting on the procedural status seems to have developed into the rule that "Fifth Amendment self-incrimination rights continue in force until sentencing." *Abbe*, 916 F.2d at 1067; *see, e.g., De La Cruz*, 996 F.2d at 1313; *Mathews*, 997 F.2d at 851 n.4; *Lugg*, 892 F.2d at 102-03. As noted, in many of the cases such statements were dicta, as the witness could have been subject to prosecution for other crimes as a result of the compelled testimony and the holdings therefore did not actually extend the Fifth Amendment to sentencing proceedings.

In some cases, however, the courts have segued into the related proposition that the witness could claim the Fifth Amendment privilege if his or her testimony might be used to enhance his sentence. *See United States v. Garcia*, 78 F.3d 1457, 1463 & n.8 (10th Cir.), *cert. denied*, 116 S. Ct. 1888 (1996). Although by repetition this statement appears to have evolved into an accepted rule, we believe it does not withstand analysis, and our opinion in *Frierson* suggests the same. In a footnote in that opinion, we stated, "the Fifth Amendment privilege is not implicated when a defendant is asked to talk about the crime to which he has pled guilty and about his or her attitude concerning that crime. *Nor is the privilege implicated if the sentence imposed is more harsh* because of the defendant's response to that interrogation." 945 F.2d at 656 n.2 (emphasis added).

We see nothing in the Fifth Amendment ("No person . . . shall be compelled in any criminal case to be a witness against himself. . . .") or in the Supreme Court's cases construing it that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction. The sentence is the penalty for the very crime of conviction, and if one could refuse to testify regarding the sentence then that would contravene the established principle that upon conviction, "criminality ceases; and with criminality the privilege." 8 Wigmore, Evidence § 2279 (McNaughton rev. 1961). Similarly, although there may be many components to be considered in computing the sentence in the new era of Sentencing Guidelines and statutory sentencing directives, one cannot logically fragment the sentencing process for this purpose and retain the privilege against self-incrimination as to one or more of the components. Whether the defendant used a gun or had responsibility for more than five kilograms of cocaine is not an issue of independent criminality to which the Fifth Amendment applies in sentencing. Thus, we agree with the suggestion in *Frierson* that the privlege against self-incrimination is not implicated by testimony affecting the level of sentence. *See Frierson*, 945 F.2d at 656 n.2.

Mitchell would have us find that *Frierson* is inapplicable to a situation where a defendant pled guilty but reserved the issue of the amount of drugs for sentencing. She argues that she never admitted to a drug quantity in her plea and specifically reserved the right to contest at sentencing the amount of cocaine attributable to her. We find that argument unpersuasive. Mitchell opened herself up to the full range of possible sentences for distributing cocaine when she was told during her plea colloquy that the penalty for conspiring to distribute cocaine had a maximum of life imprisonment. While her reservation may have put the government to its proof as to the

amount of drugs, her declination to testify on that issue could properly be held against her.

Unlike the witnesses who were still open to prosecution in the series of cases referred to above where the courts sustained the invocation of the Fifth Amendment, Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense, *see* 18 Pa. S.C.A. § 111. As the government notes, Mitchell "was not asked to testify about offenses outside the scope of her guilty plea," appellee's brief at 33, and we thus agree that once she pled guilty to the substantive offense she lost her Fifth Amendment privilege as to that offense.

We thus conclude that although Mitchell faced the possibility of a harsher sentence for this drug offense because of her failure to testify at the sentencing hearing to counter the credibility of Thompson and the other witnesses, in light of the fact that she does not claim that she exposed herself to future federal or state prosecution, the Fifth Amendment privilege no longer was available to her.

B.

Sufficiency of the Evidence

Mitchell also argues that, whatever our decision on the Fifth Amendment claim, the government did not prove by a preponderance of the evidence that she had sold at least thirteen kilograms of cocaine. We review the district court's findings of fact regarding drug quantity to determine whether they are clearly erroneous. *United States v. Miele*, 989 F.2d 659, 663 (3d Cir. 1993).

Although the sentencing court must carefully scrutinize the government's evidence, 'in calculating the amount of drugs involved in a particular operation, a degree of estimation is sometimes necessary." *United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir.), *cert. denied*, 510 U.S.

968 (1993). In this case, the district court found credible the four witnesses who testified that Mitchell sold cocaine on a regular basis. Thompson testified that Mitchell sold between one and a half to two ounces of cocaine two to five times a week between April 1992 and March 1994. Riley and Thompson buttressed this testimony by testifying as to Mitchell's role in the conspiracy. Furthermore, the court could infer, from Mitchell's refusal to offer any evidence to the contrary, that these amounts were reliable. We cannot find that the district court's findings were clearly erroneous.

III.

For the reasons set forth, we will affirm the judgment of conviction and sentence.

MICHEL, *Circuit Judge*, concurring.

While I agree with the result, I am not persuaded to join the categorical rationale that a guilty plea entirely waives a defendant's Fifth Amendment privilege—even as to facts that are not elements of the offense charged and as to which a defendant expressly "reserved" in offering a plea. Further, if the court's opinion is ready to indicate merely that the reservation here was ineffective, it is unclear to me why.

Mitchell and her attorney explicitly identified the quantity of drugs stated in the indictment, emphasizing that they "reserved" as to that allegation. It is true that neither Mitchell nor her attorney said anything about Mitchell believing she thereby retained a right to silence at sentencing. Was that omission fatal? And what if they had? Would the trial judge then have been obligated either to reject the plea or to refrain from relying on Mitchell's silence at all?

I accept that ordinarily a guilty plea waives the privilege as to all facts concerning the transactions alleged in an indictment. My only question is whether the same rule applies in the face of such an express reservation as to a non-element, especially where, as here, the defendant's silence was relied on in part to double the mandatory minimum sentence to ten years.

Finally, I believe the appeal could be disposed of under the Harmless Error rule. The trial judge found the government witnesses' testimony credible and sufficient to prove five kilograms, without considering Mitchell's silence. While he later relied as well on her silence in determining her sentence, the evidence amply supported his finding on quantity apart from the reliance. Given the unsettled state of the law among the Circuits on this important Fifth Amendment issue, I would defer a decision on it to a case in which deciding it is unavoidable and

the briefs are more informative. Moreover, although the majority accurately analyzes and artfully distinguishes seemingly contrary decisions by other Circuits, I hesitate to create an apparent split among Circuits.

AMENDED ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-1605

UNITED STATES OF AMERICA

v.

AMANDA MITCHELL

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and MICHEL,* *Circuit Judges*

The petition for rehearing filed by Appellant Amanda Mitchell in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Becker, Judge Mansmann, Judge Scirica and Judge Nygaard would have granted rehearing.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: Oct. 17, 1997

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* Hon. Paul R. Michel, United States Court of Appeals for the Federal Circuit, as to panel rehearing only.

SUPREME COURT OF THE UNITED STATES

No. 97-7541

AMANDA MITCHELL,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 15, 1998

(6)

No. 97-7541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMANDA MITCHELL,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the district court improperly burden a defendant's Fifth Amendment right not to be compelled to testify by taking a negative inference from the invocation of the Fifth Amendment at sentencing and using that negative inference as a basis for the sentence imposed?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties, Amanda Mitchell and the United States. The remaining twenty-two individuals who were indicted along with Amanda Mitchell as co-defendants have finalized their cases. Some went to trial and were acquitted or convicted. Others pled guilty and took no appeal. No other co-defendant was a co-party on petitioner's appeal to the Third Circuit or in her petition to this Court.

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OPINIONS BELOW

The Third Circuit's opinion (per Sloviter, C.J., with Roth, J. and Michel, J. concurring) and the Court's accompanying judgment were filed on September 9, 1997. The opinion is published as *United States v. Amanda Mitchell, a/k/a Amanda Foster*, 122 F.3d 185 (3d Cir. 1997). The Petition for Re-argument In Banc was denied on October 17, 1997, with four judges dissenting. JA 129. There is no published opinion of the District Court. The judgment of the Honorable Edward N. Cahn, Chief Judge, Eastern District of Pennsylvania, imposing sentence was dated July 2, 1996. JA 101-111.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 9, 1997. JA 112. The judgment became final by the denial of the Petition for Re-argument In Banc on October 17, 1997. JA 129. The petition for a writ of certiorari was timely filed on January 13, 1998, within ninety (90) days of the final judgment of the Circuit Court. *See* S.Ct. Rule 13.1. Certiorari was granted by this Court on June 15, 1998. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "[N]o person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

A. Procedural History

In August 1994, a federal grand jury sitting in the Eastern District of Pennsylvania returned an indictment against Petitioner, Amanda Mitchell, and twenty-two

other individuals in the Allentown, Pennsylvania area. JA 2-34. Count Two of the indictment charged a single conspiracy against all twenty-three individuals pursuant to 21 U.S.C. Section 846 for conspiring to distribute in excess of five kilograms of cocaine from 1989 to March 1994. JA 3-11. In addition, the indictment charged numerous substantive drug related counts against most of individuals including, as to the Petitioner, three counts of distribution of a controlled substance near a school in violation of 21 U.S.C. Section 860. JA 15, 20, 23.

On October 16, 1995, Petitioner changed her plea from not guilty to the four counts of the indictment with which she had been charged, to guilty of all four counts. JA 35-52. At the change of plea proceeding before the Honorable Edward N. Cahn, Chief Judge of the Eastern District of Pennsylvania, Petitioner admitted her guilt and waived her various constitutional trial rights. During the colloquy, the Petitioner, through counsel, stated that she was not conceding that she had been involved in more than five kilograms of cocaine distribution as had been alleged in the conspiracy count to which she was pleading guilty. JA 38-39. Instead, Petitioner specifically reserved the question of the drug quantity attributable to her for sentencing purposes. JA 39. The Judge ascertained she understood that regardless of the drug quantities attributable to her under the conspiracy count, the Petitioner would be sentenced to a mandatory minimum period of incarceration of at least one year pursuant to 21 U.S.C. 860. Judge Cahn accepted the guilty plea of the Petitioner, while noting that she had specifically reserved for sentencing the quantity of drugs at issue. Judge Cahn made clear that the Petitioner knew and understood that if he found that she was responsible for five kilograms or more of cocaine she would be subject to a mandatory minimum period of incarceration of ten years. JA 40.

In January 1996, several of the remaining defendants proceeded to trial before Judge Cahn. During the course

of that trial, the prosecutor elicited testimony about the overall drug conspiracy and the individuals who participated in it, including the alleged involvement of Petitioner who was not represented at or a party to that trial.

On July 2, 1996, Amanda Mitchell appeared before Judge Cahn for sentencing. The prosecutor presented evidence regarding Amanda Mitchell's involevment in the conspiracy to allow the Judge to make a determination pursuant to *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992) of the drug quantities for which she was responsible. JA 53. The prosecutor presented transcripts from the trial as well as live testimony of three witnesses. JA 53-79.

At the conclusion of the prosecution evidence at sentencing, Judge Cahn inquired of Petitioner what her involvement in the conspiracy had been. JA 93, 97-98. Amanda Mitchell, through counsel, invoked her Fifth Amendment right to remain silent. JA 95. Judge Cahn stated that based upon the evidence presented to him and the negative inference he drew from the Petitioner's invocation of her Fifth Amendment right to remain silent, JA 98, he concluded that she had been responsible for over thirteen kilograms of cocaine, yielding a mandatory minimum sentence of ten years incarceration and a guideline range of 97-121 months. JA 98. Judge Cahn explicitly relied on the negative inference to resolve to doubts that he expressed about the reliability of the accomplice testimony. JA 98-99.

Petitioner appealed the sentence to the United States Court of Appeals for the Third Circuit, contesting both the drug quantity analysis in which Judge Cahn had engaged as well as the propriety of burdening her Fifth Amendment right to remain silent.[1] The Third Circuit,

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[1] The issue of drug quantity analysis for determination of the proper sentence under *Collado, supra*, requires a judge to individualize the drug quantities as to particular defendant as well as examine with caution the testimony and evidence provided by cooperating informants. *Collado, Supra* and *United States v. Miele*, 989 F.2d

after oral argument, issued its opinion on September 9, 1997, affirming the drug quantity analysis and upholding Chief Judge Cahn's determination that the Petitioner had no Fifth Amendment right to decline to be a witness against herself at her own sentencing, and therefore, he could take a negative inference against her for doing so. JA 112-128. On Petition for Reargument to the Third Circuit, Petitioner set forth a comprehensive analysis of the split between the circuits as well as the bases for invoking the Fifth Amendment—protecting oneself from an increased sentence and from the possibility of prosecution for additional offenses. The Third Circuit denied reargument in banc, on October 17, 1997, with four judges dissenting. JA 129. This Court granted certiorari on June 15, 1998.

B. Factual History

Amanda Mitchell appeared before Judge Cahn on October 16, 1995, to enter guilty pleas to all four counts with which she had been charged. During the colloquy Judge Cahn ascertained that she was willing to plead guilty to the conspiracy count, but she did not agree that she was culpable for five kilograms of cocaine. JA 38. Judge Cahn explained that her sentence would be determined largely by the quantity of cocaine for which she was responsible and that would be determined at an evidentiary hearing at sentencing where the government would have to prove her level of drug involvement. JA 40-43.

Judge Cahn also explained to Ms. Mitchell that by pleading guilty she was waiving various trial constitu-

659 (3rd Cir. 1993). Mitchell claimed that there was contradictory evidence regarding the length of time she was involved in this conspiracy—and therefore—the quantities of drugs she was responsible for. The higher estimates were given by cooperating informants whose testimony should have been taken with caution by the sentencing court, but which were not. The defense agreed that Petitioner was responsible for distributing a quantity of cocaine that yielded sentencing guidelines of twenty-one to twenty-seven months.

tional rights, including her Fifth Amendment right to remain silent *at trial.* JA 45.

The sentencing hearing before Judge Cahn required the Government to prove specific drug quantities so that the Court would be able to individualize Amanda Mitchell's sentence pursuant to the dictates of *Collado, supra.* In order to meet this burden of proof, the prosecutor incorporated the trial testimony of four witnesses—Alvitta Mack, Richard Thompson, Shannon Riley, and Paul Belfield. Trial testimony of Alvitta Mack consisted of specific evidence that on three separate occasions Amanda Mitchell delivered quantities of cocaine to her amounting to approximately two ounces. JA 86. These deliveries formed the basis of the only drug quantities for which Petitioner asserted there was reilable evidence upon which to base a sentence. JA 86. Ms. Mack did not testify at sentencing and Ms. Mitchell did not contest the veracity of that trial testimony.

The remaining three individuals testified at sentencing as well as adopted their trial testimony. Shannon Riley's testimony was vague and included no specific drug quantities. JA 75-76. Paul Belfield's testimony mentioned specific drug quantities, but of very small amounts and all occurring through the first half of 1992. JA 78-79. The sole individual who implicated Ms. Mitchell's involvement beyond 1992 was Richard Thompson. His credibility was suspect as he had a prior criminal record, had been involved in significant drug distribution of his own, and was the beneficiary of a cooperation plea agreement. JA 53-71.

Judge Cahn asked Amanda Mitchell if she had anything to say in her behalf regarding her involvement in

[2] At trial Mr. Thompson did not implicate Amanda Mitchell's involvement beyond 1992. At sentencing, he did. In addition, there were other variances between his testimony as well as a general questioning of his credibility in light of his prior convictions and hs own drug dealing activities.

this drug conspiracy. Counsel, on her behalf stated that the only specific drug quantities that had been established pursuant to the dictates of *Collado* were those set forth by Alvitta Mack, amounting to approximately two ounces. The rest of the testimony was not worthy of belief, and was too conjectural for the Court to base a sentence. JA 86-87. The Court rejected this argument and concluded that Petitioner had been involved in distributing approximately thirteen kilograms of cocaine. This was less than the PSI had asserted, but still sufficient to generate a guideline range of 97-121 months and to place Amanda Mitchell in prison for the mandatory minimum period of ten years. JA 99.

When called upon to state her involvement, Ms. Mitchell said:

> "My name is Amanda Mitchell. I know for a long time I used drugs. I did a lot of things I—to get drugs. I'm thankful to be alive today, from getting away from drugs. I changed my whole life totally around, and I just got away from it. I got too involved with doing drugs. And as much drugs as I did, I couldn't have did all the other things. That's all I have to say." JA 98.

Counsel then invoked Ms. Mitchell's Fifth Amendment right to remain silent at sentencing. JA 95, 98. The Court disagreed, stating that she no longer retained such a right. At the conclusion of the sentencing hearing Judge Cahn explained to Petitioner that he had specifically evaluated the testimony regarding drug quantities against her and took into consideration the fact that she refused to testify. JA 98-99. He stated that he did not believe that she had a valid Fifth Amendment right to remain silent and therefore he was taking a negative inference against her interests in evaluating the evidence. Judge Cahn then stated that if he was wrong in this analysis and the appellate court sent the matter back to him, he would re-evaluate the credibility of the informants who testified at the sentencing. JA 98-99.

SUMMARY OF ARGUMENT

The Fifth Amendment commands, "no person . . . shall be compelled in any criminal case to be a witness against himself." Sentencing is clearly part of a criminal case. It has all the fundamental attributes of a criminal case—a critical stage warranting counsel, protections from an increase of punishment under the double jeopardy clause, and due process provisions that are reserved for criminal matters. This Court has recognized that sentencing is part of a "criminal case" warranting Fifth Amendment potections when it precluded the government from using statements that were secured in violation of the Fifth Amendment at a penalty phase hearing. *Estelle v. Smith*, 451 U.S. 454 (1981). *Estelle* is part of the long tradition of granting liberal construction to the Fifth Amendment protections that are designed to protect not just against a prosecution, but against the ultimate reason for a prosecution—the imposition of a penalty and with it, the concomitant restriction of liberty. The history and tradition of the Fifth Amendment reflects that it is a bulwark against the improper removal of liberty. As such, its application at sentencing is pellucid.

This Court has a long tradition of honoring the Fifth Amendment by precluding the improper burdening of that constitutional provision by drawing negative inferences from its invocation. It is clear that such negative inferences cannot be drawn at trial. However, impermissibly burdening the Fifth Amendment right against self-incrimination is not limited to trial matters. On the other hand, the Fifth Amendment can be burdened in a non-punitive setting, such as a civil disciplinary proceeding or psychiatric commitment. Those settings, non-punitive in nature, do not preclude the burdening of the Fifth Amendment by a negative inference. A sentencing following the finding of guilt is an integral part of the criminal proceeding and its purpose is punitive. As such, it is improper for the Court to burden the invocation of the Fifth Amend-

ment right to remain silent by drawing a negative inference against the petitioner for doing so.

In addition to protecting against an increase of sentence, the Fifth Amendment can also be involved at sentencing to protect against subsequent prosecutions. Petitioner was still at risk to be prosecuted for a variety of substantive drug and tax offenses in spite of her plea to conspiracy.

Finally, the plea of guilty does not constitute a waiver of the Fifth Amendment. The colloquy waiving her Fifth Amendment right to remain silent made a specific reference to that right at trial *only*. Further, the Fifth Amendment is waived only by answering questions—not through a generalized waiver at guilty plea.

ARGUMENT

THE SENTENCING COURT IMPERMISSIBLY BURDENED THE DEFENDANT'S RIGHT TO REMAIN SILENT UNDER THE FIFTH AMENDMENT BY TAKING A NEGATIVE INFERENCE WHEN SHE REFUSED TO TESTIFY BY INVOKING THE FIFTH AMENDMENT AS TO HER INVOLVEMENT IN THE DRUG CONSPIRACY TO WHICH SHE HAD PLEADED GUILTY BUT HAD SPECIFICALLY RESERVED THE DETERMINATION OF THE DRUG QUANTITIES ATTRIBUTABLE TO HER FOR A SENTENCING HEARING.

A. The Fifth Amendment Right Against Self Incrimination Protects A Defendant From Being The Instrument Of Her Own Increase In Punishment By Compelling Her To Testify At The Sentencing.

Petitioner, Amanda Mitchell, is a forty-five year old mother and grandmother with no prior criminal record. In August 1994, she was indicted along with twenty-two other individuals in the Allentown, Pennsylvania area for allegedly participating in a drug conspiracy spanning several years. In addition to the conspiracy count, Ms. Mitchell was charged with distributing a controlled substance (cocaine) near a school on three separate occasions, each of which formed the basis for three separate substantive counts under 21 U.S.C. Cec. 860. She pled guilty to all four counts—conspiracy as well as the three substantive counts—in October 1995. JA 51.

After several of the defendants proceeded to trial in January 1996, Ms. Mitchell appeared before Chief Judge Cahn of the United States District Court for the Eastern District of Pennsylvania on July 2, 1996. At an extensive sentencing hearing, consisting of the live testimony of three witnesses and their trial testimony incorporated by reference, plus the trial testimony incorporated by reference of a fourth witness, the sentencing court demanded that the petitioner inform him what the scope of her involvement in the drug distribution had been. JA 83. When she declined to testify and invoked her Fifth Amendment right to remain silent, the Judge responded by stating that she had no such right at this stage in the proceedings. JA 95. Further, in computing the drug quantities,[3] the Judge specifically held the negative inference of the allegedly improper invocation of the Fifth Amendment against her. JA 98. The Judge stated that should the appellate courts determine that she did, in fact, have a right against self-incrimination at this stage of the proceedings, he would reconsider his evaluation of the credibility of the witnesses whose testimony he had used to determine the quantities of drugs, and therefore the basis of her sentence. JA 99.

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[3] "We wish to emphasize that in deciding whether accomplice attribution is appropriate, it is not enough to merely determine that the defendant's criminal activity was substantial. Rather, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to insure that defendant's sentence accurately reflects his or her role." *Collado, supra* at 989.

1. *The Plain Language Of The Fifth Amendment As Well As Decisions Of This Court And All Other Circuit Courts Which Have Addressed The Issue Have Concluded That Sentencing Is Part Of A "Criminal Case" Such That The Petitioner Cannot Be Compelled To Be A Witness At Her Own Sentencing.*

The language of the Fifth Amendment is clear. It states, "[n]o person . . . shall be compelled in *any criminal case* to be a witness against himself." (Emphasis added). The scope of the term—"any criminal case"—has been defined by this Court. By reliance upon these unequivocal words in the constitution, this Court has not hesitated to give the privilege against self-incrimination wide application when there is the possibility of criminal sanctons. See *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). It applies to protect against state and federal prosecutions and investigations. *Malloy v. Hogan*, 378 U.S. 1 (1964). It protects against not only actual incrimination, but also against furnishing a link in a chain of evidence which could be used to bring criminal charges. *Hoffman v. United States*, 341 U.S. 479 (1951).

The legislative history regarding the self-incrimination clause of the Fifth Amendment is virtually nonexistent. Therefore, the best place to determine the meaning and scope of this clause is in the language itself. *United States v. Balsys*, —— U.S. ——, 118 S.Ct. 2218 (1998). This most recent pronouncement by this Court on the scope of the Fifth Amendment is instructive in determining the scope of the language. In *Balsys*, this Court was faced with determining whether the words, "any criminal case", encompassed foreign prosecutions. In concluding that they did not, the opinion of the court recognized that there was little assistance provided by legislative history and instead, in the first instance, examined the words of the Fifth Amendment. The same analysis is used to

determine if sentencing following a conviction is encompassed by the words "criminal case."

To hold that the Fifth Amendment does not apply at sentencing, is to remove sentencing as part of the criminal case. This clearly makes no sense in fact, logic or law. Sentencing is the heart of the criminal case. For the Government, it is the very reason for bringing prosecution against an individual, to inflict punishment for misdeeds against society. For the defendant it is the purpose for which the Constitution has established various protections—so that his liberty—the actual punishment inflicted —cannot be removed without Constitutional protections. Virtually every aspect of criminal law includes sentencing as part of a "criminal case". This Court has termed sentencing a "critical stage" at which a defendant is entitled to the effective assistance of counsel. *Gardner v. Florida*, 430 U.S. 349 (1977). The double jeopardy clause, contextually[4] found in close proximity to the "self-incrimination" clause of the Fifth Amendment protects not only against a second prosecution, but also against increases in punishment. *Weaver v. Graham*, 450 U.S. 24 (1981). There must be compliance with Due Process at sentencing, requiring the prosecution to furnish evidence to the defendant which is exculpatory at trial or which mitigates punishment at sentencing. *Brady v. Maryland*, 373 U.S. 83 (1963). The burden of proof to estab-

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[4] It is significant that the double jeopardy clause and the self-incrimination clause are located together in the Fifth Amendment for determining whether sentencing is included within the concept of a "criminal case". In *Balsys, supra*, this Court found that the contextual relationship between the double jeopardy clause and the self-incrimination clause lent support to the conclusion that neither were meant for protections outside of the United States. Since the double jeopardy clause protects against increase in punishment, it lends support to the idea that the term "criminal case" as to the self-incrimination clause must also include the punishment, or sentencing phase, of a criminal case.

lish particular sentencing based facts falls upon the prosecution. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

All the Circuit Courts except the court below which have addressed the question of whether a criminal defendant retains the right to avoid being a witness against himself at sentencing, and thereby become the instrument of his own increase of punishment, have found the Fifth Amendment right applicable. *United States v. De La Cruz*, 996 F.2d 1307 (1st Cir. 1993); *United States v. Lugg*, 892 F.2d 101 (D.C. Cir. 1989). *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1075-76 (6th Cir. 1990); *United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States v. Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992) and *United States v. Kuku*, 129 F.3d 1435 (11th Cir. 1997). The Third Circuit, in this case, has set itself apart from all the other circuit courts, and subjected itself to criitcism for its separate view.[5]

In each of these cases, the various circuit courts of appeal have expressly found that a criminal defendant, ". . . retains a legitimate protectable interest in not testifying as to incriminating matters that could yet have an impact on his sentence." *Lugg, supra* at 103. The First Circuit in *De La Cruz, supra*, found the Fifth Amendment protected the defendant's right not to impair his prospects for being deemed a "minor participant" and secure a lesser sentence. It reaffirmed this holding in *United States v. Montilla-Rivera*, 115 F.3d 1060, 1065 (1st Cir. 1997), and, in doing so, expressly relied upon this court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). The Eleventh Circuit reached the same conclusion, first in *United States v. Matthews*, 997 F.2d 848, 851, n.4 (11th Cir. 1993) recognizing a defendant's right not to be the instrument of his own increase in punish-

[5] *See*, 111 Harvard Law Review 1143 (February 1998).

ment, and most recently reaffirmed that view in *Kuku, supra*.

The Third Circuit decision in this case not only parts company with all the other circuits, but it does so by misconstruing the holdings of those cases. That court opined that the other circuit decisions only permitted the invocation of the Fifth Amendment to protect against subsequent prosecutions, not to protect against increases in punishment. This is flatly contradicted by the language of these cases which clearly encompass a protection from an increase of punishment.

Finally, the Third Circuit's reliance upon *Reina v. United States*, 364 U.S. 507 (1960) for the proposition that the Fifth Amendment evaporates upon conviction is misplaced. That case involved a defendant who had already been sentenced and was incarcerated as a result of the conviction and sentence and who was additionally granted immunity. Therefore, his testimony could not increase his sentence and the immunity protected him from other prosecutions. *Reina*, simply, has no bearing on this case.

Similar reliance by the Third Circuit on *Ullman v. United States*, 350 U.S. 422, 431 (1956) to the effect that once, ". . . criminality has been taken away, the amendment ceases to apply," was equally misplaced. *Ullman* was also an immunity case which never addressed the question of an increase in sentence. Indeed, if sentencing is deemed to be part of the criminality—and Petitioner contends that it is—then *Ullman* supports her position. It is only once *all* criminality is removed, including sentencing, that a person can be compelled to testify. *Reina* and *Ullmann* contain dicta which misled the Third Circuit into concluding that the Fifth Amendment protections cease at conviction. Neither of these cases stands for this position and neither involve facts from which this conclusion can properly be drawn.

In addition to setting itself apart from the circuits which have addressed this issue, the Third Circuit decision ignores this Court's pronouncement in *Estelle v. Smith, supra,* the case which is most nearly on point. In *Estelle,* this Court considered whether statements made by an incarcerated defendant to a psychiatrist for use at the penalty phase following a conviction for a first degree murder implicated the Fifth Amendment. In concluding that such statements were inadmissible because of the absence of warnings mandated by *Miranda v. Arizona,* 384 U.S. 436 (1966), the Court cautioned that the core of the Fifth Amendment right to protect against self-incrimination

> The availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites . . . we can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. . . . *Any effort by the State to compel respondent to testify against his will at the sentencing clearly would contravene the Fifth Amendment.* (Emphasis added).

451 U.S. at 462-63 (citations omitted). Indeed, at the oral argument in *Estelle,* the State conceded it could not compel the defendant's testimony at sentencing. *Id.*, n.7. The *Estelle* Court recognized that permitting the invasion of the Fifth Amendment right to remain silent at sentencing had dire implications which would undercut the basic adversarial process. Relying upon *Culombe v. Connecticut,* 367 U.S. 568 (1961), the Court stated that the Fifth Amendment not only protected against a defendant being the "deluded instrument of his own conviction", but also "from being made the 'deluded instrument' of his own execution." *Estelle* at 464, citing *Culombe* at 581.

The *Estelle* Court did not hesitate to find that the Fifth Amendment was fully applicable at sentencing. This Court continued the vitality of that decision in *Pennsylvania v. Muniz,* 496 U.S. 582 (1990), *Powell v. Texas,* 492 U.S. 680 (1989) and *Satterwhite v. Texas,* 486 U.S. 249 (1988). While each of these cases, including *Estelle,* involve the death penalty, there is no basis to limit the applicability of the Fifth Amendment protections to cases in which the ultimate penalty of a sentence of death is involved. The decisions which have invoked the "heightened scrutiny" of a death case have never upheld the application of a fundamental constitutional principle at trial or sentencing, while denying its applicability in non-death cases. Indeed, in *Solem v. Helm,* 463 U.S. 277 (1983), this Court rejected the State's contention that the Eighth Amendment bar against cruel and unusual punishment does not involve a proportionality analysis in non-death cases. While acknowledging that cases involving the death penalty differ in kind, not just degree, *Id.* at 289, this Court did not find that this crucial aspect of the Eighth Amendment did not apply to prison sentences.[6] The right to counsel embodied at *Gideon v. Wainwright,* 372 U.S. 335 (1963), a non-capital case itself, has never been limited to capital cases. Similarly, the rights embodied in *Miranda v. Arizona, supra,* have never been limited to capital prosecutions.

There is simply no basis to limit *Estelle* to a capital murder penalty phase. Indeed, this Court in *Estelle* implied as much by stating:

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[6] The only clear line of demarcation as to the application of a fundamental criminal constitutional protection lies at the question of whether there is the deprivation of liberty, not the quantity of liberty at issue. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). *In accord, Nichols v. United States,* 511 U.S. 738 (1994) (use of uncounseled conviction for which no incarceration was imposed is constitutionally permissible to enhance sentence for a new conviction).

> Any effort by the State to compel respondent to testify against his will at the *sentencing* hearing clearly would contravene the Fifth Amendment. *Id.*, at 464. (Emphasis added).

Finally, *Estelle* relied upon *In re Gault*, 387 U.S. 1 (1967), a case which established that the Fifth Amendment applies to a juvenile court adjudication in which punishment by commitment to a state institution may follow. By relying upon *Gault*, the Court in *Estelle* implied that the Fifth Amendment protections apply in the full range of criminal prosecutions to protect against the imposition of the deprivation of liberty—whether that deprivation of liberty is in the form of an ameliorative treatment of a juvenile facility or where the ultimate sanction is the death penalty. For *Gault*, it was the threat of deprivation of liberty that was determinative in the application of the Fifth Amendment to juvenile proceedings. In *Estelle* the same rights were applied in a capital murder hearing. In the case at bar, the Petitioner was subject to ten years incarceration. There has never been a basis to distinguish these situations insofar as the application of the Fifth Amendment is concerned.

This Court's decision in *Estelle* sits squarely within the framework of the Fifth Amendment as defined by this Court precedent. It is not a novel extension of the right to be protected from compelled testimony. Rather, *Estelle* acknowledges that the Fifth Amendment is a fundamental protection embodied in the Bill of Rights of the Constitution. It rests at the core of fundamental guarantees of liberty and therefore it must be liberally construed. *Hoffman v. United States*, 342 U.S. 479, 341 U.S. 479, 486 (1951), citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *Hoffman* made clear that the Fifth Amendment protects not only against compelling testimony regarding the commission of a crime, but also against evidence which may furnish a chain in a link of evidence that could lead to a prosecution. *Id.* at 486-488.

The bar against compelling an individual to provide evidence against himself is a reflection of another fundamental precept of American jurisprudence. Ours is a system that is adversarial in nature, not inquisitorial. Because of this, the privilege is not limited to cases in which confessions are extracted by torture or coercion. Rather, the privilege relates to any compulsion or pressure[7] to provide evidence against oneself. Since "the American system of criminal prosecution is accusatorial, not inquisitorial", *Malloy, supra*, 378 U.S. at 7, it relies firmly upon the Fifth Amendment privilege to remain silent. The incrimination is a counterpart to the burden of proof of the government to produce evidence independent of the accused's mouth, and doing so by employing its vast resources in this endeavor.

In deciding that the Fifth Amendment is fully applicable in state and federal inquiries to protect against prosecutions launched in either jurisdiction, this Court examined the policies of the privilege against self-incrimination.

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its context with the individual to shoulder the entire load," 8 Wigmore evidence (McNaughton rev.,

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[7] *Garner v. United States*, 424 U.S. 648 (1976) (answering questions posed by a governmental entity does not constitute compulsion, but, does provide a basis for invoking the right to remain silent).

1961), 317; our respect for the inviability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald,* 233 F.3d 556, 581-582 (Frank, J. dissenting), rev'd. 353 U.S. 391; our distrust of self declaratory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent" *Quinn v. United States,* 349 U.S. 155, 162. *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964).

It is the recognition of these policies that have led to the firm foundation and the exaltation of the privilege in our system of law. To that end, it is clear that the reason for the privilege is to protect the individual not only from prosecution for a criminal offense, but, most important, protection from the severest form of punishment—deprivation of liberty. Indeed, in *Murphy* this Court first examined the early English cases before the adoption of the Constitution and found applications of the right to remain silent. In *East India Company v. Campbell,* 1 Ves. Sen. 246, 27 Eng. Rep. 1010, the Court of the Exchequer in 1749 wrote:

> that this Court shall not oblige one to discover that which, if he answers in the affirmative, will subject him to the *punishment of a crime* . . . and that he is *punishable* . . . (emphasis added)

Similarly, in *Brownsword v. Edwards,* 2 Ves. Sen 243, 28 Eng. Rep. 157 the Court stated:

> the general rule is, that no one is bound to answer so as to subject himself to *punishment,* whether that *punishment* arises by the ecleastical law of the land. (emphasis added)

After discussing the English cases and their direct reference to protection against punishment, this Court examined the case of *United States v. Saline Bank of Virginia,* 1 Pet. 100 (1828), in which the Court wrote:

> the rule clearly is, that a party is not bound to make any discovery which would expose him to *penalties* . . . *Murphy* at 378 U.S. 52, 59-60, citing Saline Bank at 104. (emphasis added)

Therefore, the earliest decisions regarding the privilege against self-incrimination adhere to the essence of the protection being against the potentiality of *punishment* or *penalties.* Indeed, the promises of the Fifth Amendment would be empty if they only protected at trial and did not apply at sentencing. It is at sentencing where the *punishment* is imposed.[8]

In the case at bar the petitioner contested the drug quantities in her case. It is the drug quantities and the role she allegedly played in the drug conspiracy that drives the actual sentence imposed. Her admission as to the scope of her involvement, the quantities she delivered and the facts and circumstances of her participation could be a link in a chain of evidence that might produce an increase in her punishment. In addition to establishing drug quantities, the role in the offense could also affect her sentence. As manager, she receives a point increase that leads directly to a higher offense level under the sentencing guidelines and, of course, a higher sentence. U.S.S.G. Sec. 3B 1.1. Therefore, statements regarding what she did and with whom could be used to drive her sentence upwards. The Fifth Amendment protects petitioner from being the "deluded instrument" of her own increase in punishment.

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[8] As noted earlier, the application of the Fifth Amendment in juvenile procedings rested upon precisely the same rationale. *See, Gault, supra.*

2. *The Sentencing Court Improperly Burdened The Right To Remain Silent By Drawing A Negative Inference From Petitioner's Invocation Of The Fifth* Amendment In That Sentencing Is A Criminal Proceeding *In Which Right Is Impermissible.*

The demand by the judge that petitioner tell him what she did, under oath, was not an informal sentencing proceeding where the judge was seeking wide ranging information upon which to exercise discretion. Rather, Judge Cahn's demands came at the conclusion of an extensive evidentiary hearing regarding the scope of petitioner's alleged involvement in the conspiracy. Witnesses were called to testify in which their credibility as cooperators, informants and drug addicts was placed on display for the judge to evaluate.[9] The proceeding before Judge Cahn was a mini-trial/sentencing hearing/penalty phase replete with the fundamentals of criminal hearing fact finding—representation by counsel, confrontation and cross-examination of witnesses, and Due Process considerations. The hearing only lacked the Fifth Amendment right to remain silent.

In *Griffin v. California,* 380 U.S. 609 (1965) this Court held that the Fifth Amendment's bar on compelling testimony was applicable to state prosecutions through the Fourteenth Amendment. In reaching that conclusion, this Court found that commenting on silence of defendant is a negative inference against the right to invoke the Fifth Amendment and thereby impermissibly burdens and penalizes the exercise of that constitutional provision. Commenting on the refusal to testify ". . . is a remnant of the 'inquisitorial system of criminal justice,'" *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964),

[9] Under Third Circuit law the judge is required to give drug estimates rendered by an informant addicts special scrutiny. *United States v. Miele,* 989 F.2d 659 (3rd Cir. 1993) and the government must furnish reliable evidence of an individual's level of drug involvement. *United States v. Reyes,* 930 F.2d 310 (3rd Cir. 1991).

which the Fifth Amendment outlaws. *Griffin, supra,* 380 U.S. at 614. Imposing such a burden or penalty on the exercise of the right against self-incrimination transgresses the Constitution.

In *Carter v. Kentucky,* 450 U.S. 288 (1981), the Court extended *Griffin* to include the right to have the jury expressly instructed that no adverse inference can be taken from the defendant's decision not to testify. *In accord, James v. Kentucky,* 466 U.S. 341 (1984). The *Carter* decision extended to the States on Constitutional grounds the policy that was already in place under Federal statutory law of granting such a jury instruction upon request. *Bruno v. United States,* 308 U.S. 287. *Carter* recognized that the Fifth Amendment right in this regard is a basic constitutional privilege directed to the heart of the American system of justice. *Id.,* at 299-300. As such, these fundamental constitutional guarantees are not decided by whether the prosecution occurs in state or federal court, or whether it involves the death penalty (*Griffin*) or a term of years for lesser criminal offenses (*Carter* and *James, supra*). Regardless of the jurisdiction or the kind of offense, the deprivation of liberty is palpable and requires that the constitutional right not be impermissibly burdened by a negative inference at sentencing.[10]

This Court has not hesitated to strike laws and practices which impermissibly burden the Fifth Amendment right to remain silent by placing a penalty on its invoca-

[10] Nor can *Griffin* and its progeny be distinguished on the basis that these decisions involve protecting a lay jury which might misunderstand the reason for invocation of the Fifth Amendment. This Court, in *Baxter v. Palmigiano,* 425 U.S. 303 (1976), held that a prison disciplinary proceeding can draw a negative inference from the prisoner's refusal to testify without impermissibly burdening the Fifth Amendment. Significantly the Court found several reasons to permit such an inference, but, did not do so on the basis that no jury was involved which might misunderstand the constitutional right to remain silent.

tion. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the State was barred from removing a political party officer from that position on the basis of his refusal to waive the privilege against self-incrimination. Similarly in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) the State was barred from refusing to issue a public contract on the basis of the contractor's refusal to waive the Fifth Amendment privilege. *See also Gardner v. Broderick*, 392 U.S. 273 (1968) (Policeman who refused to waive his Fifth Amendment privilege may not be dismissed from office because of that refusal) and *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (City workers were unconstitutionally discharged where that discharge was based upon the invocation of the Fifth Amendment right to remain silent). Each of the foregoing cases involve the loss of significant economic rights by the simple invocation of the Fifth Amendment. No loss of liberty was at stake. Rather, in each of these cases it was the right of these individuals to pursue various economic activities. Of course, the reason for invocation of the Fifth Amendment was the potential for subsequent criminal prosecution. Nonetheless, this Court determined that such economic interests placed an improper burden on the prospect of self-incrimination.

In *Baxter v. Palmigiano, supra* this Court declined to extend the *Lefkowitz-Garrity* decisions to include a bar upon a prison disciplinary board taking an adverse interest against an inmate's invocation of the right to remain silent. The decision in *Baxter* rested upon the Court's determination that a prison disciplinary hearing is a mere civil proceeding. Negative inferences against the Fifth Amendment are permitted in civil proceedings. *Baxter supra* at 318.

> Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context. *Id.* 319.

Baxter, supra, commenced a line of cases in which this Court found the Fifth Amendment protections do not apply because of the *civil* nature of the proceedings. The civil penalty trial in *United States v. Ward*, 448 U.S. 242, 248 (1980) was not sufficiently punitive to warrant the Fifth Amendment protections which are reserved for "any criminal case". *See also, Allen v. Illinois*, 478 U.S. 364 (1986) (commitment under a "sexually dangerous predator statute" is civil treatment in nature and non-punitive Therefore, no Fifth Amendment right to remain silent). *Ohio Adult Parole Authority v. Woodard*, 523 U.S. ——, 118 S.Ct. 1244 (1998) (negative inference may be taken at clemency hearing because such proceedings are not "integral part of the system for adjudicating guilt or innocence of the defendant").

These cases make clear that once a matter is deemed civil, or in the case of *Woodard, supra*, so far removed from the criminal process (*Woodard*, involved clemency by the *Executive*, not even a judicial function), it is not improper to "burden" the Fifth Amendment. However, sentencing is a crucial aspect of the criminal process. It is not a civil hearing, and unlike *Ward, supra*, sentencing *is* meant to be punitive. Where this Court has placed the line demarking the application of the Fifth Amendment at whether the hearing is punitive, there is no question that sentencing falls to the side of that line where the Fifth Amendment protections cannot be impermissibly burdened.

The question of whether the exercise of a constitutional provision is impermissibly burdened is best determined by evaluating the legitimacy of the challenged government practice. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 n.20 (1973). For instance, while there is a general bar under the Fifth Amendment against burdening the defendant's right to remain silent, once that individual testifies his credibility is open to question as any witness. Therefore, his pre-arrest silence can be used against him because the

government has a legitimate interest in using the customary trial tactics as weapons. *Jenkins v. Anderson*, 447 U.S. 231 (1980). Similarly, in *Baxter, supra*, the government has a legitimate interest in an efficient prison disciplinary process.

There is no such legitimate interest at a contested sentencing proceeding. Therefore the invocation of the Fifth Amendment protects the defendant from being the mechanism of his own increase of sentence. It is an integral part of the criminal judicial adjudication process. *Woodard, supra.*

While it is true that the sentencing court has a legitimate interest in gathering as much information as it can about the defendant in order to properly exercise sentencing discretion, it cannot do so in an unconstitutional fashion. Certainly aspects of the sentencing process are more relaxed so as to facilitate the gathering of this information. *Williams v. New York*, 337 U.S. 241 (1949) (Confrontation Clause is not offended by the use of a written pre-sentence report). A judge may consider a defendant's truthfulness while testifying on his own behalf, and, if he unilaterally concludes that the defendant committed perjury while testifying, use that as a basis to increase the sentence. *United States v. Grayson*, 438 U.S. 41 (1978). Indeed, the sentencing court can even consider offenses for which a person has been acquitted in fashioning a sentence. *United States v. Watts and Putra*, 529 U.S. ——, 136 L.Ed.2d 554 (1997), per curiam. In *Nichols v. United States*, 511 U.S. 728 (1994) (use of a misdemeanor conviction which did not result in a sentence of imprisonment can be considered at sentencing) and *Witte v. United States*, 515 U.S. 38 (1995) (use of relevant conduct pursuant to U.S.S.G. 1B1.3 did not violate the double jeopardy clause), this Court has once again reiterated the broad scope of information the courts may consider at sentencing. However, this principle does not address the central question at issue in this

case—whether the invocation of the Fifth Amendment right to remain silent falls within the 'broad inquiry' the Court may consider at sentencing.

This Court has been loathe to permit constitutional violations which go to the very heart of the criminal process. Uncounseled felony convictions cannot be used to enhance sentences. *United States v. Tucker*, 404 U.S. 443 (1972). *See also Townsend v. Burke*, 334 U.S. 736 (1948) (submission of improper information violates due process at sentencing).

Nor does *Roberts v. United States*, 445 U.S. 752 (1980), represent a "legitimate" government interest so as to permit the Fifth Amendment to be burdened. In *Roberts* this court upheld a sentence based, in part, on the defendant's refusal to cooperate with the law enforcement authorities. *Roberts* stands for the unremarkable proposition that a defendant, like any citizen, must report criminal actvity about which he is aware. In reaching this conclusion, the Court stated that, "unless his silence is protected by the privilege against self-incrimination, . . .", *Id.*, at 558, a defendant must speak when required to do so at sentencing. Therefore this Court recognized that the Fifth Amendment right to remain silent is not an appropriate factor for a Court to consider when fashioning a sentence. It is a constitutionally protected area which cannot be burdened at trial or sentencing.

In addition, silence does not reflect upon the character or history of a defendant, like a prior conviction or other criminal activities. It is merely remaining silent to facts within the defendant's knowledge so that the defendant does not become a witness against himself. Silence is ambiguous.[11]

Given the ambiguity of silence, and its constitutionally protected status under the Fifth Amendment, it is im-

[11] Silence lacks significant probative value to permit reference to it at trial. *United States v. Hale*, 422 U.S. 171 (1975).

proper to permit a negative inference to the invocation of the Fifth Amendment. It impermissibly burdens that constitutional right.

B. The Petitioner Had The Right To Invoke The Fifth Amendment And Remain Silent At Sentencing Because She Was Still Subject To Further Prosecution By State And Federal Authorities.

The Fifth Amendment protects an individual from the real threat of prosecution in either Federal or State Court *Malloy v. Hogan, supra*, and *Murphy v. Waterfront Commission, supra*. As noted before, it not only protects an individual from being a witness against himself with exposure to actual incrimination, as well as protecting one from furnishing a "chain in a link of evidence" which may be used to fashion a prosecution against him. *Hoffman, supra*. The Fifth Amendment is as broad as the harm it seeks to protect. This Court has determined that it protects a person from being a witness against himself in any prosecution in this country, leaving an individual subject only to the possibility of incriminating himself in a foreign prosecution. *Balsys, supra*. It can be invoked during a criminal prosecution or investigation, *Griffin, supra*; a federal grand jury, *Hoffman*; state investigation which may implicate Federal laws, *Murphy v. Waterfront Commission, supra*; a civil deposition, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); or even, during a sentencing hearing, *Roberts, supra* 445 U.S. at 558. The Fifth Amendment clearly protects an individual from being prosecuted on the basis of a statement made in another setting.

Amanda Mitchell pled guilty to a broad conspiracy pursuant to 21 U.S.C. § 846. Count II of the indictment, a conspiracy count, charged that the petitioner and twenty-two other individuals over a period of approximately five years in two counties, and elsewhere, combined to distribute in excess of five kilograms of cocaine. In nine and one-half pages of a conspiracy count the government al-

leged details of specific roles that particular individuals took as well as broad language that was inclusive of a wide range of activities.[12] JA 3-11. This broad language subjected the petitioner to the possibility of further prosecution on substantive counts by state or federal authorities.

It is clear that having pled guilty to the drug conspiracy, she could not be prosecuted for that offense again without violating the Double Jeopardy Clause. She could also not be charged with a conspiracy under Pennsylvania law as the Pennsylvania Constitution prohibits subsequent prosecution where jeopardy has attached in federal court. *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 (1973); 18 Pa. Cons. Stat. Sec. 110. However, nothing in federal jurisprudence nor in Pennsylvania law prohibits either jurisdiction from prosecuting Amanda Mitchell for substantive charges based upon her testimony at sentencing if she were to admit to delivery of controlled substances on any other occasion than the three substantive counts to which she pled guilty. There is no double jeopardy bar to successive prosecutions for a conspiracy followed by substantive offense, and testimony for such actions could lead to such a prosecution. *United States v. Felix*, 503 U.S. 378 (1992); *United States v. Dixon*, 509 U.S. 688 (1993).

In addition to the fear of prosecution for substantive drug delivery offenses, compelling Amanda Mitchell to testify could lead to a "link in a chain" of evidence to prosecute her for a violation of RICO, 18 U.S.C. Sec. 1962(c); money laundering pursuant to 18 U.S.C. Secs.

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[12] Paragraph 3 of the "manner and means" if Count II of the indictment reads, "it was further part of the conspiracy that the defendants and others known and unknown to the Grand Jury would and did distribute quantities of cocaine to customers". Paragraph 4 of the "manner and means" of Count II reads, "it was further part of the conspiracy that the defendants would and did act in different roles and would and did perform different tasks at different times.

1956-57; violations of the Travel Act under 18 U.S.C. Sec. 1952; and using a telephone to facilitate a controlled substance transaction in violation of 21 U.S.C. Sec. 843. Further, compelling Amanda Mitchell regarding her activities with drug distribution—and the money she may have secured as the result of this activity—could subject her to tax evasion charges under 26 U.S.C. Sec. 7201 and/or making a false statement upon a tax return in violation of 26 U.S.C. Sec. 7206, and similar charges under state law.

The possibility of incrimination on other charges satisfies the Fifth Amendment standard that the risk of testimony and incrimination must be "real and appreciable". *Marchetti v. United States*, 390 U.S. 39, 48 (1968). If the government wants her testimony at sentencing it had, within its arsenal of weapons, the right to immunize her to remove the fear of prosecution. That the government may be unlikely to pursue a particular defendant once he has been sentenced to a substantial prison term does not remove the real and appreciable fear of further prosecution. The guarantees of the Fifth Amendment protect the individual; the individual need not rely on the good graces of the government's "promise" not to seek further prosecution.

C. Petitioner Does Not Waive Her Fifth Amendment Right To Remain Silent By Entering A Guilty Plea In Which She Specifically Reserved Her Right To Contest Any Drug Quantities At Sentencing, Especially Where The Judge In Conducting The Guilty Plea Colloquy Made Clear To Her That The Burden Of Proof At The Sentencing In Establishing The Drug Quantities Would Be On The Government And Where He Specifically Stated That Waiving Her Right Against Self-Incrimination Was Limited To That Right At Trial.

The relinquishment of a constitutional right can only be accomplished by a knowing and intelligent waiver of that right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). It is

for this reason that federal courts must conduct extensive colloquies concerning the waiving of fundamental constitutional rights before a guilty plea can be accepted. *See* F.R.Cr.P. 11. There are two reasons why the entry of a guilty plea and the purported waiver of the Fifth Amendment right against self-incrimination did not constitute a waiver of that right at sentencing (1) factually there was no such blanket waiver, and (2) if there had been, a criminal defendant still retains a right to decline to questions which may incriminate her.

The colloquy of the guilty plea mandated by Rule 11 and the dictates of *Johnson v. Zerbst, supra* are to insure that fundamental rights are not waived without knowledge of their consequences. To this end Chief Judge Cahn explained to Petitioner the role and function of a sentencing hearing where drug quantities, and, therefore, her likely sentence, are at issue. Judge Cahn stated in dialogue with counsel the following:

> . . . and another important factor is that you're charged in Count II with conspiring to distribute more than five kilograms of cocaine, and that makes the penalties more severe.
>
> Mr. Morley: Judge, we don't agree as to the quantity in this case.
>
> The Court: I understand that you're going to contest her involvement in more than five kilograms.
>
> Mr. Morley: That's correct, sir.
>
> The Court: And that's going to be determined at sentencing.
>
> Mr. Morley: Exactly, sir. And—
>
> The Court: You're going to have a hearing on that.
>
> Mr. Morley: Right. I've explained that to Ms. Mitchell.
>
> The Court: Okay. But she should understand that if she loses that issue, penalties would be much more severe.

Mr. Morley: Yeah, I've explained that to her.

The Court: Okay. Now, it's very-the range of punishment here if very complex because we don't know how much cocaine the government's going to be able to show you were involved in. Listen closely while we go over the range of penalties, and Ms. Miller will do that for us.

The Court: Okay. Now, the penalties you just set forth, Ms. Miller, assume there's a 5 kilogram involvement?

Ms. Miller: That's correct, sir.

The Court: So those are the penalties if the government can prove that you were involved in five kilograms of cocaine distribution. Your lawyer says you're not, is that right?

Mr. Morley. That's correct, sir.

The Court: So if you are not, then the penalties would be less. What do you think the quantity is going to come out to be?

Mr. Morley: Judge, we would—we believe the penalty—the quantities are specified in as specified in the three substantive courts, which is about 85—I believe its between 50 and 100 grams of —.

The Court: And what would the penalty be in that case?

Mr. Morley: The penalty in that case I believe a maximum of ten years. And the—I've discussed—at length with Ms. Mitchell is the sentencing guideline ranges well.

The Court: And what would that be?

Mr. Morley: The guideline range in that is 15 to 21 months not including various adjustments for—

The Court: Acceptance—

Mr. Morley: Acceptance of responsibility, level of participation. I have explained to her that there are fudge factors of points going up and down. I've showed her the graphs and how that might work. JA ——

The Court and counsel continued to evaluate the sentence and explain to Ms. Mitchell that she would be subject to a mandatory minimum of one year for her plea of guilty to 21 U.S.C. Sec. 860, distribution of drugs near a school. Judge Cahn carefully explained to Ms. Mitchell that regardless of the sentencing guidelines and whatever deviations she might be able to persuade him she was entitled to, she was facing a minimum of one year in prison for the violation of sec. 860. JA 41-42.

The colloquy established two fundamental factors at petitioner's guilty plea. First, she was clearly and unequivocably informed that there would be a hearing at sentencing to determine largely determine her sentence—from a mandatory minimum of ten years to a mandatory minimum of 1 year. She was also informed that should her position prevail, her likely sentence would be between fifteen and twenty-one months' incarceration. However, if the government prevailed she was facing a minimum of ten years incarceration. Second, the colloquy established that the burden of proving the quantity of drugs rests upon the government. On two occasions during this colloquy, Judge Cahn made clear that the government has the burden of proof—". . . we don't know how much cocaine the government's going to be able to show you were involved in." JA 39. Later, Judge Cahn stated that those are the penalties if the Government, "can prove that you were involved in five kilograms of cocaine distribution." JA 40.

In surrendering her right to her trial, Amanda Mitchell believed that she would have a full sentencing hearing where she could contest the quantities of drugs attributable to her, and therefore, what her sentence would be. In that hearing, the burden of proof was going to fall squarely upon the government.[13]

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[13] As noted before, the Fifth Amendment is inextricably linked to the burden of proof resting upon the government. *Malloy v. Hogan, supra,* 378 U.S. at 8.

Even more telling than the role of the government at sentencing and what Ms. Mitchell was informed of when she was waiving her right to trial, is the specific character of the Fifth Amendment she was waiving. In conducting the colloquy regarding the surrendering of constitutional rights Judge Cahn stated

> You have the right *at trial* to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy . . . If you plead guilty, all of those rights are gone. (emphasis added) JA 45.

Therefore, on these facts, Judge Cahn did not accept a broad based waiver of *all* Fifth Amendment rights. Rather, the waiver of the Fifth Amendment secured in this case is limited to its invocation at trial. By no stretch of the imagination can Petitioner have been waiving her right to remain silent at sentencing when all she understood at the guilty plea colloquy was that the implications of the entry of this plea was that she was waiving her *trial* right to remain silent. This is not a knowing and intelligent waiver of the Fifth Amendment at sentencing. *Johnson v. Zerbst, supra.*

The entry of a guilty plea while reserving certain rights is not unusual in Federal Court and has been used to permit a partial waiver of rights. F.R.Cr.P. 11 provides for the entry of "conditional' guilty pleas. This procedure permits a defendant to waive all his constitutional rights, including appellate rights, except for the right to appeal a particular pre-trial motion. Even before such conditional guilty pleas were made part of the Federal Rules of Criminal Procedure, the Third Circuit adopted this procedure. *United States v. Zudick*, 523 F.2d 848 (3rd Cir. 1975). Not all circuits agreed with the propriety of a conditional guilty plea. *United States v. Drummond*, 488 F.2d 972, (5th Cir. 1974). Nonetheless, the practice has now been sanctioned as proper in the Federal Rules. In essence, an individual may go through an entire

colloquy waiving his constitutional rights to trial and to appeal, entering a guilty plea and subjecting himself to a particular sentence, while still maintaining the right to appeal a pre-trial ruling. The entry of such a plea, does not constitute a knowing and intelligent waiver of all trial and appellate rights because it carefully excepts some from the waiver.

Petitioner entered a conditional guilty plea. She specifically reserved at the guilty plea colloquy the right to contest the evidence against her at sentencing. She anticipated a hearing with the burden of proof upon the government to establish drug quantities, and therefore, her sentence. In the same fashion, that a conditional guilty plea under Rule 11 is not a *waiver* of all rights, so the entry of a guilty plea in the fashion made by Amanda Mitchell is not a *waiver* of her constitutional rights at sentencing. Those rights, of necessity, must include the right to remain silent.

Assuming arguendo that this guilty plea colloquy could, in some fashion, be construed to include a so-called waiver of the Fifth Amendment, it is clear that the right not to be a witness against oneself is not waived by a generalized surrrendering of rights. Rather, it is waived by answering particular questions. It is invoked in response to particular questions and its waiver cannot be had until the witness answers. It is the incriminating *testimony* that triggers the exercise of the Fifth Amendment, not some generalized surrendering of a trial right making certain that an individual understands that by the entry of a guilty plea they may be questioned regarding the incident to which they have pled guilty.

A reading of *Hoffman supra*, makes clear that the privilege is testimonial based. It is not invoked in a generalized sense, but, rather invoked on a question by question basis. It is only by such particularized invocation that there can be a fair determination made of the propriety of its invocation. Similarly, in *Murphy supra*, it

was the refusal to answer particular questions that raised the issue of the Fifth Amendment. *In accord, Malloy supra.* In none of these cases did the individual's appearance at proceedings constitute a waiver of the Fifth Amendment. Rather, it was answering particular questions that implicated the Fifth Amendment.

Perhaps it was best said in *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984), where this Court stated:

> Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. If he asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him" in a subsequent criminal proceeding. *Maness v. Meyers*, 419 U.S. 449 (1975) (White, J., concurring in result) (*emphasis in original*).

It is the *questions* that trigger the need to invoke the Fifth Amendment. *Minnesota v. Murphy, supra*, involved the question of invocation of the Fifth Amendment by a probationer. The mere acceptance of the terms of probation by that individual do not constitute a waiver of the Fifth Amendment any more than mere understanding that by waiving a right to a trial, and its concomitant Fifth Amendment guarantees, constitutes a waiver to the Fifth Amendment at sentencing. It is the questions and answers that control, not the proceeding which triggers the invocation of the Fifth Amendment. Indeed, in the one case which comes closest to addressing the question of invocation of the Fifth Amendment at sentencing, *Roberts v. United States, supra*, this Court declined to hold that allowing credit for cooperation could constitute a burden upon the invocation of the Fifth Amendment. In doing so, this Court did not state that the mere fact

that the defendant in that case had pled guilty would constitute a waiver of the Fifth Amendment. Rather, the court analyzed the scope of the Fifth Amendment and the implications of cooperation and held that each individual has an obligation to give evidence of a crime if it is aware to that person. Only if the defendant expressly relied on the Fifth Amendment, with a basis for doing so, could a constitutional issue arise. However, the entry of a guilty plea in *Roberts, supra*, did not, and could not, constitute a waiver of the Fifth Amendment.

In the same fashion, Ms. Mitchell's entry of her guilty plea in this case does not waive her right to remain silent at her sentencing. In the first instance it is clear from the text of the transcript that she was merely waiving her right at trial. Furthermore, she did what any person must do who seeks to invoke the protections of the Fifth Amendment—she did so in response to a question.

CONCLUSION

For the reasons argued herein, petitioner respectfully requests that this Court vacate the sentence in this case with directions for the matter to be returned to the District Court for re-sentencing.

Respectfully submitted,

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(1)

No. 97-7541

In the Supreme Court of the United States

OCTOBER TERM, 1997

AMANDA MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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46 pp

QUESTION PRESENTED

Whether a defendant's plea of guilty to an offense waives any Fifth Amendment privilege to remain silent at sentencing about the details of that offense.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 112-128) is reported at 122 F.3d 185.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1997. A petition for rehearing was denied on October 17, 1997. J.A. 129. The petition for a writ of certiorari was filed on January 13, 1998, and was granted on June 15, 1998. J.A. 130. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment provides, in relevant part: "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." Relevant

portions of Rule 11 of the Federal Rules of Criminal Procedure are set forth in an appendix to this brief.

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a), and one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to ten years' imprisonment, to be followed by six years' supervised release. The court of appeals affirmed. J.A. 112-128.

1. Petitioner and 22 other defendants were indicted for their roles in a cocaine distribution conspiracy that operated between 1989 and 1994 in Allentown, Pennsylvania. Petitioner was charged in Count 2 of the superseding indictment with conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and in Counts 11, 21, and 28 with separate instances of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a). J.A. 3-11, 15, 20, 23.

a. Petitioner pleaded guilty, without a plea agreement, to all four counts with which she was charged. She reserved, however, the opportunity to contest at sentencing the quantity of cocaine attributable to her on the conspiracy count. J.A. 37-39, 51. The court advised petitioner that the quantity determination would be made following a sentencing hearing (J.A. 39), and that her guilty plea exposed her "to serious punishment depending on the quantity involved" (J.A. 42). The court and the government informed petitioner of the penalties for her offenses (J.A. 39-43, 51), including the ten-year mandatory minimum sentence under

21 U.S.C. 841 for distribution of at least five kilograms, but less than 15 kilograms, of cocaine (J.A. 39, 42).

In the colloquy required by Rule 11 of the Federal Rules of Criminal Procedure, the court also explained to petitioner that she would waive various rights by pleading guilty. J.A. 43-45. In discussing the rights at issue, the court stated that "[y]ou have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy." J.A. 45. After the court had placed petitioner under oath (J.A. 36), the government, at the court's request, provided the factual basis for the cocaine conspiracy and distribution offenses. The government described the evidence showing that petitioner was part of an organization that distributed cocaine on a daily and weekly basis in the Allentown, Pennsylvania, area and that she had aided and abetted or personally conducted the distributions in the substantive counts in which she was charged. J.A. 46-47. The court then asked petitioner whether she had engaged in the conduct that the government had described. J.A. 47. Petitioner acknowledged that she had done "[s]ome of it," but expressed reservations about one of the substantive cocaine distribution counts. *Ibid.* After discussion about the conduct that was charged against petitioner in that count, petitioner affirmed her desire to plead guilty to it. J.A. 47-50.[1]

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[1] The count at issue (Count 11) charged petitioner and three others with distributing cocaine, and aiding and abetting the distribution of cocaine, on April 9, 1992. J.A. 15. Petitioner initially indicated that she did not recall that she was present at that transaction or that four people were present. J.A. 48. Her counsel then explained that petitioner had earlier acknowledged to him that she was present during the delivery of cocaine on that date, but that she disputed the government's theory that she was

At the conclusion of the plea proceeding, the court asked "[h]ow say you to Count 2, charging you with conspiracy to distribute cocaine; Count 11 and 21, charging you with distribution and/or aiding and abetting the distribution of cocaine within 1,000 feet of a school; and Count 28, charging you with distribution or aiding and abetting distribution within 1,000 feet of a playground, guilty or not guilty?" J.A. 51. Petitioner stated "[g]uilty." *Ibid.*

b. Nine of petitioner's co-defendants went to trial. Much of the trial testimony centered on the activities of Harry Riddick, the leader of the cocaine distribution ring. Three of the original co-defendants, who had pleaded guilty and agreed to cooperate with the government, testified that petitioner was one of Riddick's regular sellers. Shannon Riley testified that she had often seen petitioner at Phill's Bar and Grill, the headquarters of the cocaine distribution ring, going into the bathrooms to sell cocaine. Paul Belfield testified that, when he was selling cocaine for Riddick in 1991 and 1992, petitioner delivered the cocaine to him. He testified that petitioner used pagers and two-way radios provided by Riddick for her cocaine deliveries. Richard Thompson testified that from April 1992 through December 1993, petitioner sold one-and-a-half ounces of cocaine to customers two or three times a week. J.A. 115-116.

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there to be introduced to the customer so that she could sell cocaine to her in the future, since petitioner already knew the customer. J.A. 48-49. The court noted that, based on those facts, petitioner might have a defense to the charge that she aided and abetted the drug distribution on that date, but advised petitioner that it was her choice whether to present that defense at trial or to relinquish it and plead guilty. J.A. 49-50. Petitioner reaffirmed her intention to plead guilty. J.A. 50.

2. At petitioner's sentencing hearing, Riley, Belfield, and Thompson adopted their trial testimony. In addition, Thompson testified that, between April 1992 and August 1992, petitioner had worked two or three times a week, selling one-and-a-half to two ounces of cocaine each time; between August 1992 and December 1993, petitioner had worked three to five times a week; and from January through March 1994, petitioner was one of those in charge of cocaine distribution for Riddick. Petitioner's counsel cross-examined those witnesses. The parties also referred to trial evidence indicating that, in 1992, Alvita Mack had received three deliveries of cocaine, totaling two ounces, from petitioner. After Riley, Belfield, and Thompson had testified, the district court advised petitioner's counsel that petitioner "may testify if she wishes, but she may remain silent." J.A. 53-82, 88-90, 116-117.

Petitioner did not offer any evidence at the sentencing hearing. Nor did she testify under oath to rebut the government's evidence about drug quantity. Rather, petitioner, through counsel, argued that the evidence of her three sales to Mack was the only evidence sufficiently reliable to be credited in determining the quantity of cocaine attributable to her for sentencing purposes. J.A. 98.

The district court rejected petitioner's arguments. The court found that the testimony identifying petitioner as a drug courier on a regular basis during an extended period was "substantially accurate" (J.A. 117) and that her sales of one-and-a-half to two ounces of cocaine twice a week for a year and a half put her "well over five kilograms" (J.A. 93). See also J.A. 98-99. The court stated that "[o]ne of the things" that persuaded it to rely on the testimony of Riley, Belfield, and Thompson was petitioner's "not testifying to the contrary."

J.A. 95, 118; see also J.A. 98 (advising petitioner that "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times"). The court reasoned that it could consider petitioner's silence against her without violating the Fifth Amendment, because "once a criminal defendant in a felony charge pleads guilty, then that defendant * * * no longer has a Fifth Amendment right to remain silent." J.A. 95, 118.[2]

The district court found that petitioner had participated in the distribution of almost 13 kilograms of cocaine during the conspiracy. J.A. 99, 119. In explaining its ruling to petitioner, the court stated that "it's pretty clear you were a courier for two to three years, and that by delivering small quantities, it adds up to more than five kilograms." J.A. 98. The court noted that "without anything from you and with my understanding of this Riddick cocaine organization, I think you were involved in more than five kilograms of cocaine." J.A. 99. In light of its drug quantity finding, the court imposed a sentence of ten years' imprisonment —the minimum term applicable when the quantity of cocaine involved is five kilograms or more. *Ibid.*; see 21 U.S.C. 841(b)(1)(A)(ii).

3. The court of appeals affirmed. The court rejected petitioner's claim that the district court had erred in drawing an adverse inference from her failure to testify at the sentencing hearing. J.A. 119-125. The court

[2] The district court then permitted petitioner to make an unsworn statement. Petitioner acknowledged that "for a long time I used drugs" and that "I did a lot of things I—to get drugs." She added: "I got too involved with doing drugs. And as much drugs as I did, I couldn't have did all the other things. That's all I have to say." J.A. 98, 118.

observed that, "if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege." J.A. 119 (citing *Ullmann* v. *United States*, 350 U.S. 422, 431 (1956)). The court noted that a defendant who has pleaded guilty to an offense "waives his privilege as to the acts constituting it." J.A. 120. The effectiveness of such a waiver, the court observed, depends on the defendant's receiving advice from the trial court about the rights relinquished by such a plea. But here, the court noted, petitioner did not dispute that she had entered a knowing and voluntary plea after having been advised of the consequences of her guilty plea, including her "forfeiture of * * * the right to remain silent under the Fifth Amendment." *Ibid.*

The court of appeals acknowledged that, in general, a defendant's plea of guilty to one offense does not waive the Fifth Amendment privilege with respect to other offenses. J.A. 121-122. The court stated, however, that the Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" does not extend to testimony that would only "have an impact on the appropriate sentence for the crime of conviction." J.A. 124. The court noted that petitioner "does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense, see 18 Pa. C.S.A. § 111." J.A. 125; see also *ibid.* (observing that petitioner "does not claim that she exposed herself to future federal or state prosecution").[3] The court further concluded that the amount of cocaine involved in petitioner's con-

[3] The Pennsylvania statute cited by the court of appeals bars, with certain exceptions not applicable here, a state prosecution following a federal conviction based on the same conduct.

spiracy offense, while affecting the severity of her sentence, "is not an issue of independent criminality to which the Fifth Amendment applies." J.A. 124. Nor did petitioner's reservation of the issue of drug quantity at the time of her plea change the analysis. The court explained that, "[w]hile [petitioner's] reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." J.A. 124-125.

The court of appeals rejected petitioner's claim that the evidence was insufficient to support the district court's finding that she had distributed nearly 13 kilograms of cocaine in the conspiracy. The court observed that the district court had found credible the testimony of four witnesses that petitioner sold cocaine on a regular basis, including Thompson's testimony that petitioner sold one-and-a-half to two ounces of cocaine on two to five days per week between April 1992 and March 1994. In addition, the court noted that the district court could infer that those amounts were reliable from petitioner's refusal to offer any evidence to the contrary. J.A. 125-126.

Judge Michel, in a concurring opinion, agreed with the majority that "ordinarily a guilty plea waives the privilege as to all facts concerning the transactions alleged in an indictment." He questioned, however, whether that rule applied in this case given petitioner's reservation of the quantity issue at the time of her guilty plea. J.A. 127. But Judge Michel deemed it unnecessary to resolve that issue. He concluded that any error in that regard was harmless because "the evidence amply supported [the district court's] finding on quantity," even without consideration of petitioner's silence. *Ibid.*

Petitioner filed a petition for rehearing with suggestion for rehearing en banc, which asserted, for the first time, that her testimony about the cocaine distribution conspiracy could implicate her in other crimes. Petition for Rehearing at 11-13. The court of appeals denied the petition, with four judges dissenting. J.A. 129.

SUMMARY OF ARGUMENT

A defendant who pleads guilty to a crime waives any Fifth Amendment privilege that he would otherwise possess at sentencing to remain silent about the details of that crime. That principle reflects the well-settled rule that "disclosure of a fact waives the privilege as to details." *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). Under that rule, a witness who testifies to committing a crime "is not permitted to stop, but must go on and make a full disclosure." *Id.* at 373 (quoting *Brown* v. *Walker*, 161 U.S. 591, 597 (1896)). That rule guards against the "distortion of the facts" that would occur if such a witness were permitted "to select any stopping place in the testimony." *Id.* at 371.

A plea of guilty constitutes "a confession" by the defendant, under oath and in open court, "which admits that [he] did various acts" constituting the crime. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). Indeed, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Having admitted to each and every element of the crime by entering a guilty plea, the defendant has no Fifth Amendment privilege at sentencing to refuse to disclose the details of the crime, including those details that could enhance his sentence or that could incidentally implicate him in additional crimes.

The understanding that a defendant who pleads guilty no longer has any Fifth Amendment privilege to refuse to testify about his offense in his own criminal case is reflected in Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(f) directs a district court not to enter judgment on any guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." Rule 11(d) requires a district court to "determin[e] that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Rule 11(c)(5) contemplates that the court may satisfy those requirements by "question[ing] the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded." There are many circumstances in which a district court may need to question a defendant extensively about the details of his crime in order to ascertain that his guilty plea has a factual basis and is being given voluntarily.

In light of those requirements placed on the district court to ensure that a guilty plea is factually grounded and voluntary, it is indispensable to the proper functioning of the Rule 11 colloquy that a defendant relinquish any Fifth Amendment right he might otherwise have to remain silent about the details of the crime. And having relinquished any Fifth Amendment privilege on those details in entering his plea of guilty, a defendant cannot claim protection for a decision to remain silent about his crime at sentencing. Any other rule would give defendants a strong incentive at the guilty plea stage to conceal or minimize their actual conduct, and would thereby intrude on the court's ability to evaluate and accept guilty pleas.

A defendant's waiver of the Fifth Amendment privilege by virtue of a guilty plea is not unlimited. A

guilty plea, like a defendant's testimony at trial admitting or denying the crime, waives the privilege only as to matters "reasonably related" to the crime. *McGautha* v. *California*, 402 U.S. 183, 215 (1971). As the courts of appeals have also recognized, a waiver of the privilege applies only in the particular case in which the waiver occurs. It does not apply in separate proceedings, such as a prosecution of the defendant's confederates or a subsequent prosecution of the defendant himself. But it does apply in the defendant's own sentencing proceeding, which forms an integral part of the criminal case in which the defendant has entered his plea.

Petitioner pleaded guilty, *inter alia*, to conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. She thereby waived her Fifth Amendment privilege to refuse to testify at sentencing about the details of that offense—in particular, the quantity of cocaine that she distributed as a participant in the conspiracy. Petitioner's waiver of the privilege was not limited by her reservation of the opportunity to contest the government's evidence on drug quantity. She did not purport to reserve any privilege to remain silent with impunity on the drug quantity issue. Nor could she have done so. The scope of a Fifth Amendment waiver through a guilty plea is a legal prerequisite to, and consequence of, the plea and is not subject to unilateral restriction by the defendant.

ARGUMENT

A DEFENDANT WHO PLEADS GUILTY TO AN OFFENSE MAY NOT CLAIM THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION TO PREVENT A COURT FROM DRAWING AN ADVERSE INFERENCE FROM HIS DECISION NOT TO TESTIFY AT SENTENCING ABOUT THE DETAILS OF THAT OFFENSE

A plea of guilty constitutes "a confession" by the defendant, under oath and in open court, "which admits that [he] did various acts" constituting the crime. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). A plea of guilty waives the protection of the Fifth Amendment privilege against compelled self-incrimination on that offense. That waiver extends not only to the general outlines of the conduct constituting the crime, but also to its factual details. Petitioner's plea of guilty to a drug conspiracy offense thus constituted a waiver of her Fifth Amendment privilege with respect to the specific actions she took during and in furtherance of that conspiracy, even though those details were highly relevant in determining the length of her sentence. The district court was therefore permitted to draw an adverse inference from her refusal, at sentencing, to offer her version of her conduct in connection with the crime to which she had pleaded guilty.

A. By Pleading Guilty To An Offense, A Defendant Waives His Fifth Amendment Privilege To Remain Silent About The Details Of That Offense

The Fifth Amendment states that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." This case involves a defendant who entered a valid plea of guilty to the offenses on which

she was sentenced. That plea required and produced a waiver in her criminal case of her Fifth Amendment privilege to remain silent with respect to the charged offenses. By relinquishing her right to remain silent and instead admitting in open court her commission of the charged offenses, petitioner waived the right to remain silent about the details of those offenses, either at the plea hearing itself or at the ensuing sentencing proceedings.[4]

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[4] Petitioner argues at length that the Fifth Amendment applies at sentencing. Br. 11-22. In *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court held that the Fifth Amendment privilege applies in a capital sentencing proceeding. The Court has never addressed whether the holding of *Estelle* v. *Smith* extends to non-capital sentencing proceedings, and the question is complex. The Fifth Amendment privilege applies in "any criminal case," and a sentencing hearing itself, whether capital or non-capital, is a critical stage of a criminal case. *Mempa* v. *Rhay*, 389 U.S. 128 (1967). But in many respects, the Constitution's procedural requirements for criminal trials do not extend to sentencing. See *Libretti* v. *United States*, 516 U.S. 29, 49 (1995) (jury trial not required); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986) (proof beyond a reasonable doubt not required). The Court has also noted that sentencing judges have traditionally considered all reliable sources of information, without limitation by formal rules of evidence. *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949); see 18 U.S.C. 3661. And, while the Court in *Estelle* v. *Smith* broadly described the purpose of the Fifth Amendment as protecting against compelled testimony "to convict *and punish*," 451 U.S. at 462, it also emphasized the particular nature and gravity of a capital sentencing proceeding, *id.* at 463, a type of sentencing proceeding that this Court has often surrounded with unique procedural protections. See, *e.g.*, *Monge* v. *California*, 118 S. Ct. 2246, 2253 (1998) (confining double jeopardy ruling in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), to "the unique circumstances of capital sentencing"). Because this case involves a guilty plea and waiver principles, however, the Court need not resolve the general question whether the Fifth Amendment applies in non-capital sentencing proceedings.

1. "A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). A waiver of the Fifth Amendment privilege is inherent in any guilty plea. As this Court has recognized, it is "[c]entral to the plea and the foundation for entering judgment against the defendant" that "the defendant[] admi[t] in open court that he committed the acts charged in the indictment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969) ("A plea of guilty is * * * a confession which admits that the accused did various acts."). In entering a guilty plea, the defendant must necessarily "stand[] as a witness against himself," *Brady*, 397 U.S. at 743, and relinquish his Fifth Amendment privilege to "refus[e] to provide information on the count to which he had admitted his guilt," *United States* v. *Trujillo*, 906 F.2d 1456, 1461 (10th Cir.), cert. denied, 498 U.S. 962 (1990). See *United States* v. *Rodriguez*, 706 F.2d 31, 36 (2d Cir. 1983) (a guilty plea waives the Fifth Amendment privilege "with respect to the crime to which the guilty plea pertains") (quoting *United States* v. *Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978)); cf. *Namet* v. *United States*, 373 U.S. 179, 188 (1963) (observing that the prosecutor had "reason[ed] with some justification that [the witnesses'] plea of guilty to the gambling charge would erase any testimonial privilege as to that conduct").[5]

[5] See also *Brown* v. *Butler*, 811 F.2d 938, 940 (5th Cir. 1987) (defendant, "[b]y pleading guilty, * * * waived the privilege against compulsory self-incrimination" with respect to presentence interview that formed the basis for the sentence); *United States* v. *Fortin*, 685 F.2d 1297, 1298 (11th Cir. 1982) ("a plea of guilty waives the right against self-incrimination * * * as to matters which might incriminate the defendant of the particular crime to which the plea is made"); *United States* v. *Moore*, 682 F.2d 853, 856 (9th Cir. 1982) ("[a] voluntary guilty plea * * * is a waiver of the fifth amendment privilege * * * in regard to the crime that is admitted").

By pleading guilty to an offense, a defendant waives his Fifth Amendment privilege not only as to his commission of the offense, but also as to all details of the offense, including those details that could affect the severity of his sentence. The principle that disclosure of a fact waives the privilege with respect to the details is well established in Fifth Amendment law. In *Rogers* v. *United States*, 340 U.S. 367 (1951), a grand jury witness incriminated herself by admitting to membership in the Communist Party, but then sought to invoke the Fifth Amendment privilege to avoid disclosing the location of Communist Party membership lists and dues records. This Court rejected that effort. The Court explained that, "if the witness himself elects to waive his privilege * * * and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." 340 U.S. at 373 (quoting *Brown* v. *Walker*, 161 U.S. 591, 597 (1896)); see also *id.* at 373-374 ("[W]here a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot stop short and refuse further explanation, but must disclose fully what he has attempted to relate.") (quoting *Foster* v. *People*, 18 Mich. 266, 276 (1869)). The Court explained that a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." *Id.* at 371. *Rogers* thus stands for the general principle that "[d]isclosure of a fact waives the privilege as to details." *Id.* at 373; see also, *e.g.*, *United*

States v. *St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (L. Hand, J.) ("at least after a witness has confessed all the elements of the crime, he may not withhold the details"), cert. dismissed, 319 U.S. 41 (1943).[6]

Similarly, in *Brown* v. *United States*, 356 U.S. 148 (1958), the Court recognized that a witness cannot, after electing to give some testimony about a potentially incriminating matter, invoke the Fifth Amendment to avoid giving further testimony about that same matter. In that case, the defendant voluntarily took the witness stand in her denaturalization case and testified on direct examination that she had never belonged to any organization advocating the overthrow of the government. On cross-examination, when asked whether she had ever been a member of the Communist Party, she invoked the Fifth Amendment privilege. The Court held that the defendant, as a voluntary witness, "could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." *Id.* at 156. Many other authorities support

[6] The rule articulated in *Brown* v. *Walker*, and subsequently in *Rogers*, has been traced to two English cases from the early 19th Century involving the common-law privilege against compelled self-incrimination: *Dixon* v. *Vale*, 171 E.R. 1195 (1824) ("[I]f a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object, that any further question has a tendency to criminate him"), and *East* v. *Chapman*, 172 E.R. 259, 261 (1827) ("[H]aving given evidence, you must answer the question. You might have objected to give evidence at first, but having gone through a long history of what passed, and was not taken down, you must still go on, otherwise the jury will know only half of the matter."). The current English rule, however, is to the contrary. See *St. Pierre*, 132 F.2d at 838-839.

that proposition. See *Ohio Adult Parole Authority* v. *Woodard*, 118 S. Ct. 1244, 1252-1253 (1998) ("Long ago we held that a defendant who took the stand in his own defense could not claim the privilege against self-incrimination when the prosecution sought to cross-examine him.") (citing *Brown* v. *Walker* and *Brown* v. *United States*); *McGautha* v. *California*, 402 U.S. 183, 215 (1971) ("It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination."); 8 J. Wigmore, *Wigmore on Evidence* § 2276, at 459 (McNaughton rev. ed. 1961) (a criminal defendant's "voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between all"); *Johnson* v. *United States*, 318 U.S. 189, 195-196 (1943) (quoting Wigmore).[7]

The underlying concern in cases such as *Rogers* and *Brown* is that, if a witness could selectively invoke the Fifth Amendment privilege, it would distort the truth-seeking process by permitting the witness to present a one-sided account to the trier of fact. As the Court observed in *Brown*, to provide a witness with "an immunity from cross-examination on the matters he has himself put in dispute * * * would make of the Fifth Amendment * * * a positive invitation to mutilate the

[7] See also *Raffel* v. *United States*, 271 U.S. 494, 497 (1926) ("When [a defendant] takes the stand in his own behalf, * * * [h]is waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."); *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900) ("Where an accused party waives his constitutional privilege of silence * * * he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.").

truth a party offers to tell." 356 U.S. at 156; see also *St. Pierre*, 132 F.2d at 839-840 (noting "the obvious injustice of allowing a witness, who need not have spoken at all, to decide how far he will disclose what he has chosen to tell in part"). Once a defendant has elected to testify, therefore, "[h]is privilege against self-incrimination does not shield him from proper questioning." *United States* v. *Havens*, 446 U.S. 620, 627 (1980).

A defendant who enters a guilty plea, under oath and in open court, has, like the witness in *Rogers*, "'elect[ed] to waive his privilege * * * and disclose[] his criminal connections.'" 340 U.S. at 373. And, like the witness in *Brown*, the defendant has voluntarily come before the court to swear to a version of the events at issue, presumably after calculating that his interests would better be served by doing so than by continuing to exercise his right to remain silent. Such an individual may therefore be required to "go on and make a full disclosure," *ibid*, about all of the details of that offense, whether or not they would affect the severity of his sentence. Any contrary rule would, as further explained below, impede the trial court's ability to assess whether a defendant's guilty plea is factually based and voluntarily given and whether a defendant's sentence is appropriately tailored to his criminal conduct. It could thereby present the same dangers of "distortion" of the truth that concerned the Court in *Rogers* and *Brown*.

2. Because a defendant's waiver of the Fifth Amendment privilege extends to all details of the crime to which he has pleaded guilty, the waiver includes any such details that also may incidentally relate to crimes to which he has not pleaded guilty. The defendant does retain the privilege with respect to incriminating matters not "reasonably related," *McGautha*, 402 U.S. at 215, to the crime that was the subject of the guilty

plea. The details of the offense, however, are necessarily and inherently related to the plea.[8]

The nature of that waiver is one of the costs of a defendant's choice to enter a guilty plea. This Court's cases "do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U.S. 87, 96 (1993); *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980) (defendant's decision not to testify "because of the risk of cross-examination" is a "choice of litigation tactics"); *United States* v. *Frazier*, 971 F.2d 1076, 1080 (4th Cir. 1992) ("The Fifth Amendment does not insulate a defendant from all 'difficult choices' that are presented during the course of criminal proceedings, or even from all choices that burden the exercise or encourage waiver of the Fifth Amendment's right against self-incrimination.") (citing *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973) and *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978)), cert. denied, 506 U.S. 1071 (1993). A defendant, in consultation with counsel, is capable of evaluating the risk that testimony at sentencing about the details of the crime to which he would plead guilty might reveal his involvement in other crimes. If the defendant calculates that the risk is too great, he may choose not to plead guilty, and instead to proceed to trial. Cf. *Brown*, 356 U.S. at 155-156 ("[A] witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of

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[8] As discussed in Part C, *infra*, the waiver applies only in the particular case in which it occurs. Thus, it would not apply in a subsequent prosecution of the defendant (or others) for other crimes. It does, however, carry through to the sentencing for the offense to which the defendant has pleaded guilty.

putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute.").

The Sentencing Commission has taken a similar approach with respect to downward adjustments in a defendant's sentence for acceptance of responsibility. A defendant must "truthfully admit[] the conduct comprising the offense[s] of conviction" in order to obtain any such adjustment, but he may remain silent about "relevant conduct beyond the offense of conviction." See Sentencing Guidelines § 3E1.1 cmt. (n.1(a)). In applying Guidelines § 3E1.1, the Seventh Circuit has held that a defendant must provide a "complete and credible explanation of the conduct involved in the offense of conviction," even if that explanation might also incidentally implicate him in other, uncharged offenses. *United States* v. *Hammick*, 36 F.3d 594, 599 (1994); see *id.* at 600 (defendant could remain silent as to those matters that "bore no obvious relation to the offense of conviction"); *id.* at 602 (Bauer, J., dissenting in part) (noting that details that defendant was required to reveal might implicate her in other crimes); see also *United States* v. *Reyes*, 9 F.3d 275, 279 (2d Cir. 1993) (under Guidelines § 3E1.1, "a sentencing court may not compel testimony in respect of any offense *other* than the offense that is the subject of the plea," but "as to the offense that *is* the subject of the plea, the district court may require a candid and full unraveling").

Even if a defendant who pleaded guilty could assert the Fifth Amendment privilege at sentencing for information that, while relevant to the offense on which the

plea was entered, also revealed additional crimes for which there was a real and substantial fear of prosecution, it would not assist petitioner. Petitioner did not make any such claim to the district court or to the court of appeals panel. Indeed, the panel expressly noted its understanding that "[petitioner] does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." J.A. 125. This Court has recognized that "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing," *Roberts* v. *United States*, 445 U.S. 552, 559 (1980), but requires an assertion by the party claiming it. Even where the privilege is claimed, the specific basis for the claim must be asserted; "[t]he validity of [the witness's] justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made." *United States* v. *Murdock*, 284 U.S. 141, 148 (1931), overruled on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).[9]

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[9] It is therefore not enough that petitioner asserted the privilege at sentencing based on a different theory, *i.e.*, that her testimony could affect the severity of her sentence. This Court observed in *Roberts* that, if a defendant "believed that his failure to cooperate was privileged" and thus should not have been considered against him at sentencing, "he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." 445 U.S. at 560. Petitioner likewise should have afforded the sentencing court an opportunity to determine the legitimacy of her claim that her testimony about the quantity of cocaine that she distributed was privileged on the theory that it would implicate her in other crimes.

B. The Process For Taking A Guilty Plea Under Rule 11 Of The Federal Rules Of Criminal Procedure Confirms That The Defendant's Plea Waives The Privilege For The Details Of His Offense

Rule 11 of the Federal Rules of Criminal Procedure prescribes the inquiry that the federal district courts must conduct before accepting guilty pleas. The Rule contemplates that a defendant who pleads guilty to an offense waives the Fifth Amendment privilege with respect to all facts and circumstances of the offense.

Rule 11(f) provides that "the court should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." The court is not required to make any particular type of inquiry in order to determine whether the plea has a factual basis. Rule 11(c)(5) recognizes, however, that a court may discharge its duty of determining that a guilty plea has a factual basis by "question[ing] the defendant under oath * * * about the offense to which the defendant has pleaded." See also Advisory Committee Notes (1974 Amendment) ("An inquiry [regarding the factual basis for the plea] might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case."); *United States* v. *Tunning*, 69 F.3d 107, 112 (6th Cir. 1995) ("The ideal means to establish the factual basis for a guilty plea is for the district court to ask the defendant to state, in the defendant's own words, what the defendant did that he believes constitutes the crime to which he is pleading guilty.").

A district court is afforded wide discretion under Rule 11 to question a defendant about the crime to which he is pleading guilty. Rule 11(f) expressly

authorizes the court to conduct an inquiry as broad and intensive as necessary to "satisfy it" that such a basis exists. As the Fifth Circuit has explained, "no mechanical rule can be stated, and the more complex or doubtful the situation as to [the factual basis] requirement, the more searching will be the inquiry dictated by a sound judgment and discretion." *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). In principle, any evidence that would be relevant at trial to prove the offense would also be relevant during the Rule 11 factual-basis inquiry.

A court may often wish to question a defendant closely about the factual basis for a plea of guilty. Such a need may exist to ensure that the defendant understands possible defenses, to remove confusion about his understanding of the charged offenses, or to determine whether in fact the defendant wishes to plead guilty at all. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989). In this case, for example, the government provided the initial factual basis, and the court then asked petitioner: "Did you do that?" J.A. 47. Petitioner equivocated by saying "[s]ome of it." *Ibid.* In that situation, the court is required to go into the details of the conduct to which the defendant is prepared to admit. A similar situation arises if the court has reason to believe that the defendant might be entering a false guilty plea because of force or threats, in order to protect another person, or because of a mental defect.[10] In such a case, the

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[10] See *Godwin* v. *United States*, 687 F.2d 585, 590 n.4 (2d Cir. 1982) ("[T]he risk that a [voluntary] plea might nonetheless be inaccurate remains a matter of concern. . . . A clearly rational defendant may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person.") (quoting ABA Standards Relating to Pleas of Guilty 31 (Approved Draft 1968)).

court should conduct "a most searching inquiry," *Dayton*, 604 F.2d at 938, by questioning the defendant extensively about the facts and circumstances of the crime. Indeed, the possibility of force, threats, or mental defects implicates the very voluntariness of the plea, calling into play Rule 11(d), which *requires* the court to address the defendant personally to determine "that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." See *McCarthy*, 394 U.S. at 465-466.

A court might also wish to conduct a particularly searching factual-basis inquiry of the defendant, asking for details of the crime, where the court suspects that the defendant might have a valid defense to the charge, such as entrapment or self-defense. See *United States* v. *Frye*, 738 F.2d 196, 199 (7th Cir. 1984) ("before pleading guilty a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis of such defenses"); *Sober* v. *Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981) (same). Here, for example, after the court heard the factual basis for one count in which petitioner was charged with aiding and abetting a substantive drug distribution, the court raised the possibility that petitioner might have a defense that she "didn't take a step to further the transaction." J.A. 49. The court thus advised petitioner that she did not have "to plead to something you didn't do." *Ibid.*. Thus, as one commentator has stated, in order to "be certain that in accepting a guilty plea, it is not punishing the defendant for a crime he did not commit," the court "must engage in as extensive a colloquy as is required to verify that the plea is voluntary and proper." M. Rhodes, *Orfield's Criminal Procedure Under the Federal Rules* § 11.29, at 104 (2d ed. 1985).

Given the court's latitude to conduct an intense inquiry of the defendant under Rule 11(f), defendants may often be called upon, in response to questioning by the court about their offense conduct, to reveal or admit to facts that also could affect their sentence or implicate them in related crimes. The factual basis inquiry may, for example, involve discussion about the defendant's precise role in the crime, the defendant's motive, the identity of the victim, where the crime was committed, and the amount of money or contraband involved. See *United States* v. *Montoya*, 891 F.2d 1273, 1291 (7th Cir. 1989) (defendant's "description of his role and activities in the operation provided a sufficient factual basis for his plea of guilty to the conspiracy charge"); *United States* v. *Wetterlin*, 583 F.2d 346, 353 (7th Cir. 1978) (vacating guilty plea because defendant never admitted to facts establishing his role in the charged conspiracy), cert. denied, 439 U.S. 1127 (1979). Such details may also have a bearing on the penalty that may be imposed for the crime under the Criminal Code[11] and the Sentencing Guidelines.[12] In addition, such details may re-

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[11] A variety of statutes provide for enhanced sentences based on the way in which the crime is carried out. See, *e.g.*, 21 U.S.C. 841(b) (penalty for drug distribution offense depends on quantity of drugs involved); *Barker* v. *United States*, 7 F.3d 629, 634 (7th Cir. 1993) (recognizing drug quantity to be sentencing factor rather than element of offense under 21 U.S.C. 841), cert. denied, 510 U.S. 1099 (1994); *United States* v. *Cross*, 916 F.2d 622, 623 (11th Cir. 1990) (same), cert. denied, 499 U.S. 929 (1991); see also 18 U.S.C. 111(b) (penalty for assault on federal officer is enhanced if deadly weapon is used); *United States* v. *Young*, 936 F.2d 1050, 1053-1055 (9th Cir. 1991) (recognizing use of deadly weapon to be sentencing factor rather than element of offense under 18 U.S.C. 111).

[12] The Guidelines provide for systematic consideration of the character of the offense and the defendant's role in it. See, *e.g.*,

late to elements that are common both to the crime to which the defendant is pleading guilty and to a related crime with which the defendant has not been charged.[13] Conspiracy offenses, such as the drug conspiracy charged in this case, provide a good example of that rule: in order to determine the existence, nature, and scope of the conspiratorial agreement to which the defendant is admitting, the court would often have to inquire into specific acts that give shape and content to the agreement, even though each act may be itself a separate crime.

It would therefore be impracticable for a court to conduct a Rule 11(f) inquiry of the defendant without asking questions that touch on factors that could adversely affect his sentence or implicate him in related

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Sentencing Guidelines § 2B4.1(a)(b)(1) (penalty for bribery enhanced if bribe exceeded $2,000); *id.* § 2D1.1(b)(3) (penalty for drug distribution offenses enhanced if offense occurred in prison); *id.* § 2E2.1(b)(1)(B) (penalty for extortionate extension of credit enhanced if dangerous weapon was used); *id.* § 2K1.3(b)(1) (penalty for unlawful possession of explosives depends on quantity of explosives involved); *id.* § 3A1.1(a) (penalty depends on whether defendant was motivated by victim's race, sex, or sexual orientation in committing offense); *id.* § 3B1.2(a) (penalty is enhanced if defendant was an organizer, leader, manager, or supervisor of the criminal activity).

[13] It is not unusual for a single act to constitute an element of multiple crimes. A drug offense, for example, may be an element of an offense under 18 U.S.C. 924(c), which prohibits using or carrying a firearm during and in relation to a drug trafficking offense. A drug offense may also be an element of a continuing criminal enterprise offense under 21 U.S.C. 848. A mail or wire fraud offense may be an element of a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which requires, *inter alia*, the commission of at least two predicate acts of racketeering, including mail or wire fraud, see 18 U.S.C. 1961(1).

crimes. If a defendant had a Fifth Amendment privilege to refuse to answer such questions, the ability of the court, absent a specific waiver, to question him about the factual basis for his plea would be, at the very least, significantly impaired. Essentially, courts would be restricted to obtaining from defendants a bare-bones admission to the elements of the offense, devoid of relevant detail concerning motive, role in the offense, manner of commission, and surrounding circumstances. That would constitute a significant departure from current practice in which defendants are usually required to respond to government proffers that go well beyond the mere elements of the offense and that summarize in detail the evidence supporting the charge. See, *e.g.*, *United States* v. *Wilson*, 81 F.3d 1300, 1308 (4th Cir. 1996) ("lengthy and detailed" proffer); *Montoya*, 891 F.2d at 1290 (setting forth detailed proffer); *United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985) ("lengthy factual proffer"); J.A. 46-47 (factual basis for petitioner's cocaine conspiracy offense).

If the court can require the defendant who pleads guilty to reveal the details of the crime without violating any Fifth Amendment privilege—as a reasonable application of Rule 11 requires—it would make little sense to permit the defendant to rely on the Fifth Amendment at sentencing to withhold the same details. To the extent that the plea itself waives the privilege, there is no sound reason to conclude that the privilege revives later in the same proceeding. Indeed, any such rule would give the defendant a strong incentive during the guilty plea colloquy to provide the court with an incomplete, self-serving account of his offense, in the hope that by doing so he might avoid a harsher sentence or avoid disclosure of factually related crimes. There is no warrant for injecting such gamesmanship

into the Rule 11 process, thereby "degrad[ing] the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *United States* v. *Hyde*, 117 S. Ct. 1630, 1634 (1997).

C. A Plea Of Guilty Waives The Fifth Amendment Privilege In The Defendant's Own Criminal Case, Not In Other Cases

A court may receive a defendant's guilty plea to an offense and impose sentence on the defendant for that offense at a single hearing.[14] Far more commonly today in the federal system, the court receives the guilty plea at one hearing and imposes sentence at a subsequent hearing. See Fed. R. Crim. P. 32. In either event, the defendant's waiver of his Fifth Amendment privilege in entering his guilty plea continues to apply at sentencing, because both aspects of the case are part of a single proceeding for Fifth Amendment purposes.

It is settled that a waiver of the Fifth Amendment privilege "is limited to the particular proceeding in which the waiver occurs." *United States* v. *Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); see *United States* v. *Fortin*, 685 F.2d 1297, 1299 (11th Cir. 1982) (characterizing this rule as "hornbook law"); *United States* v. *Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976) (Clark, J.) (same). The "single proceeding" rule serves to protect a witness against changed circumstances —such as a change in the law or in the focus of inquiry—"creating new grounds for apprehension" that the witness may not have anticipated at the time of the first proceeding. *United States* v.

[14] See, *e.g.*, *United States* v. *Kassar*, 47 F.3d 562, 564 (2d Cir. 1995); *United States* v. *Eiselt*, 988 F.2d 677, 678 (7th Cir. 1993); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1488 (9th Cir.), cert. denied, 473 U.S. 913 (1985).

Miranti, 253 F.2d 135, 140 (2d Cir. 1959); accord *In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *In re Neff*, 206 F.2d 149, 152-153 (3d Cir. 1953).

A defendant's guilty plea hearing and sentencing are constituent parts of a "single proceeding" for purposes of this rule. Both are conducted in the same criminal case, before the same court, and by the same prosecuting authority. The plea and sentence focus on the same defendant and the same criminal charges. Because sentencing follows virtually automatically from the guilty plea, the two steps are integral to the entry of the judgment. Indeed, under the Federal Rules of Criminal Procedure, the court must impose sentence before a guilty plea can result in a judgment of conviction. See Fed. R. Crim. P. 32(d)(1); *Parr* v. *United States*, 351 U.S. 513, 518 (1956) ("Final judgment in a criminal case means sentence. The sentence is the judgment.") (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937)).

In cases that have held the "single proceeding" rule not to be satisfied, the proceedings were significantly more independent than the guilty plea hearing and sentencing in this case. Those cases involved a grand jury investigation and a trial based on an indictment issued by the grand jury (*Licavoli*, 604 F.2d at 623; *United States* v. *James*, 609 F.2d 36, 45 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); *Neff*, 206 F.2d at 152);[15] a trial and a retrial after an appeal (*United States* v. *Gary*, 74 F.3d 304, 312 (1st Cir.), cert. denied, 518 U.S. 1026 (1996); *United States* v. *Wilcox*, 450 F.2d

[15] But see *Ellis* v. *United States*, 416 F.2d 791, 800 (D.C. Cir. 1969) (individual who testifies before grand jury without invoking Fifth Amendment privilege waives privilege if called as witness at trial based on indictment returned by grand jury).

1131, 1141-1142 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972)); the witness's trial and a co-defendant's trial (*Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973)); and the witness's guilty plea hearing and a co-defendant's trial (*Fortin*, 685 F.2d at 1298-1299; *United States* v. *Johnson*, 488 F.2d 1206, 1210 (1st Cir. 1973)).[16]

Several courts have held that a defendant who has pleaded guilty and is awaiting sentencing may invoke the Fifth Amendment privilege to refuse to testify at the trial of a co-defendant. See, *e.g.*, *United States* v. *Kuku*, 129 F.3d 1435, 1437 (11th Cir. 1997), cert. denied, 118 S. Ct. 2071 (1998); *United States* v. *De La Cruz*, 996 F.2d 1307, 1313 (1st Cir.), cert. denied, 510 U.S. 936 (1993); *United States* v. *Bahadar*, 954 F.2d 821, 824 (2d Cir.), cert. denied, 506 U.S. 850 (1992); *United States* v. *Lugg*, 892 F.2d 101, 103 (D.C. Cir. 1989); *United States* v. *Valencia*, 656 F.2d 412, 416 (9th Cir.), cert. denied, 454 U.S. 877 (1981).[17] The results in those cases are consistent with the rule that we propose here that a guilty plea waives the Fifth Amendment privilege for the entirety of the defendant's *own* case. It is one thing

[16] See also *United States* v. *Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.) (affidavit supporting one co-defendant's severance motion, severed trial of other co-defendant), cert. denied, 439 U.S. 1005 (1978); *Cain*, 544 F.2d at 1117 (deposition in one case; trial in different case); *Marcello* v. *United States*, 196 F.2d 437, 444-445 (5th Cir. 1952) (grand jury investigation; investigation into unrelated crime by same grand jury one year later).

[17] The defendant cannot, however, assert the Fifth Amendment privilege with respect to a crime for which a final conviction, which is not under appeal, has been entered, because there is no longer any danger of further incrimination on that offense. *See Reina* v. *United States*, 364 U.S. 507, 513 (1960); *Taylor* v. *Best*, 746 F.2d 220, 222 (4th Cir. 1984), cert. denied, 474 U.S. 982 (1985).

to hold that a defendant who has pleaded guilty has no privilege to remain silent at his own sentencing with respect to details about the crime that is the subject of the plea. It is quite another to require him to respond in a separate proceeding, involving different parties with different interests, to questions that might have an adverse impact on his sentence or on his prosecution for other crimes. The distinction between the defendant's own sentencing and his co-defendant's trial is a logical application of the rule that a waiver of the privilege is limited to the proceeding in which it occurs.

D. Petitioner's Plea Of Guilty To Conspiracy To Distribute Cocaine Waived Her Fifth Amendment Privilege To Remain Silent At Sentencing About The Amount of Cocaine That She Distributed Pursuant To The Conspiracy

Petitioner, by pleading guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. 846, waived her Fifth Amendment privilege to remain silent about the details of that offense. Those details include the quantity of cocaine that petitioner agreed to, and did, distribute as a participant in the conspiracy described in the superseding indictment. Because petitioner elected to remain silent at sentencing about those details even while contesting the quantities of cocaine that were attributed to her by the witnesses presented by the government, the district court did not err in drawing the inference that any truthful testimony she might give would have been adverse to her position.[18]

[18] Indeed, the court may have had authority to draw such an inference even apart from petitioner's waiver of the privilege through her guilty plea. No federal statute or rule prohibited the court from doing so, as amicus National Association of Criminal Defense Lawyers, et al., concedes (Br. 12 n.11). Cf. 18 U.S.C. 3481 ("*In trial* of all persons charged with the commission of offenses

Petitioner, to the extent that she addresses the question whether a guilty plea to an offense constitutes a waiver of the Fifth Amendment privilege at sentencing as to all details of the offense, argues only that "factually there was no such blanket waiver in this case." Pet. Br. 29. Petitioner apparently believes that no such waiver can be valid unless the trial court not only advises the defendant generally that by pleading guilty he will lose "the right at trial to remain silent under the Fifth Amendment," as the court did here (J.A. 45), but also advises the defendant specifically that he will lose the right to remain silent at sentencing

against the United States * * *, the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him.") (emphasis added). This Court has ruled that the Fifth Amendment protects a defendant from having his silence considered against him at the guilt phase of his criminal trial, *Griffin* v. *California*, 380 U.S. 609 (1965), but has not addressed whether *Griffin* also applies at the sentencing phase. In other contexts outside the guilt phase of a criminal trial, the Court has ruled that, even where the Fifth Amendment privilege prevents compelling an individual to testify against himself, it does not unduly burden the privilege to permit the fact-finder to draw an adverse inference from the individual's decision to remain silent in the face of probative evidence. See *Woodard*, 118 S. Ct. at 1252 (clemency hearing); *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-318 (1976) (state prison disciplinary hearing). In the present context, guilt has already been established and the court is faced with the task of determining an appropriate sentence for an individual who has committed a crime. Where the defendant disputes the extent of his culpability, as shown by probative evidence offered by the government, a court should be permitted (although not required) to infer, for whatever evidentiary weight is justified, that the defendant's silence at sentencing about facts within his personal knowledge supports the inference that the truth would not be favorable.

about the offense to which he pleads guilty. See Pet. Br. 32.

This Court has recognized, however, that "an individual may lose the benefit of the [Fifth Amendment] privilege without making a knowing and intelligent waiver," at least outside a custodial setting. *Minnesota* v. *Murphy*, 465 U.S. 420, 428 (1984) (quoting *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976)); see 1 J. Strong, *McCormick on Evidence* 494 (4th ed. 1992) (noting that "[m]ost courts hold that a trial judge has no duty to admonish a represented defendant who seeks to testify that he has a right not to do so"). In *Rogers* and *Brown*, for example, the witnesses were held to have waived the Fifth Amendment privilege by testifying about their alleged offenses, although nothing in those opinions suggests that the witnesses were instructed in advance that such testimony would constitute a waiver. See *Rogers*, 340 U.S. at 377-378 (Black, J., dissenting) (noting that the Court had not required that privilege "be knowingly waived").[19] Petitioner's valid guilty plea had a comparable effect, even though the court did not advert to inferences it might draw from her silence at sentencing. As this Court has noted, "[a]part from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo." *Libretti* v. *United States*, 516 U.S.

[19] The only decision of this Court that petitioner cites in support of her position is *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). See Pet. Br. 28, 29, 32. As this Court explained in *Garner*, however, cases such as *Rogers* "do not apply a 'waiver' standard, as that term was used in *Johnson* v. *Zerbst*." 424 U.S. at 654 n.9.

29, 50-51 (1995). Petitioner makes no claim that her Rule 11 colloquy was insufficient or that her plea was not knowing, voluntary, and intelligent. J.A. 120.

Finally, petitioner's waiver of her Fifth Amendment privilege through her guilty plea was not negated, as the concurring judge below suggested (J.A. 127-128), by her reservation of the opportunity to contest at sentencing the government's position that she participated in the distribution of more than five kilograms of cocaine. A defendant who wishes to confess to the crime and permit the court to enter judgment on the plea cannot control the scope of his waiver any more than a witness who elects to testify can dictate the scope of his cross-examination. See *Rogers*, 340 U.S. at 373 (a witness who "discloses his criminal connections * * * is not permitted to stop, but must go on and make a full disclosure"). In any event, nothing in petitioner's reservation, during her Rule 11 hearing, of her right to contest drug quantity purported to reserve any right to remain silent on the issue with impunity. See, *e.g.*, J.A. 38-39 (district court observes in colloquy with petitioner's counsel that "I understand you're going to contest her involvement in more than five kilograms * * * [a]nd that's going to be determined at sentencing"); see also J.A. 42. At most, as the court of appeals explained, petitioner's "reservation may have put the government to its proof as to the amount of drugs." J.A. 124-125. It did not prevent petitioner's refusal to testify on the issue from being held against her. *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1998

APPENDIX

Rule 11 of the Federal Rules of Criminal Procedure states:

Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

* * * * *

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the

proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

* * * * *

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(8)

No. 97-7541

In The

Supreme Court of the United States

October Term, 1998

AMANDA MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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INTRODUCTION

This Reply Brief is limited in its scope, because Respondent concedes that sentencing is part of a "criminal case," *Resp. Br.* at 13 n.4, 29, and nowhere argues that giving testimony that might cause a greatly enhanced sentence does not qualify as "self-incrimination." Respondent has decided instead to argue that Petitioner Mitchell had a right to remain silent at sentencing, but waived that right with her guilty plea.

Respondent's waiver argument attempts to sidestep the holding and principles of this Court's decision in *Estelle* v. *Smith*, 451 U.S. 454 (1981). Moreover, Respondent's claims rest on two insufficient foundations: distorted readings of inapposite case law; and a fundamental misconception of the nature of the Rule 11 process for entering guilty pleas. Respondent's arguments do not establish that a defendant who pleads guilty waives her Fifth Amendment rights with regard to sentencing and, *a fortiori*, do not establish that such a rule applies to the special circumstances of Petitioner's case.

ARGUMENT

I. A GUILTY PLEA DOES NOT OPERATE TO REQUIRE A DEFENDANT TO DISCLOSE EVERY DETAIL OF HER OFFENSE AT SENTENCING

A. There Is No Compelling Reason To Limit *Estelle* v. *Smith* To Capital Cases

The most obvious starting point for analysis in this case is *Estelle* v. *Smith*, 451 U.S. 454 (1981), a capital case in which this Court held that the Fifth Amendment right against self-incrimination applied to sentencing. Because of Respondent's reliance on its waiver argument, Respondent pauses to address *Estelle* only in the alternative, in a

footnote, distinguishing *Estelle* on the sole basis that capital sentencing often entails "unique procedural protections." *Resp. Br.* at 13 n.4. However, *Estelle* nowhere suggests that the constitutional protection against self-incrimination at sentencing is unique to capital cases. For this Court's purposes, the only difference between *Estelle* and this case is that *Estelle* came first.

This Court held in *Estelle* that the "essence" of the Fifth Amendment protection against self-incrimination is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle*, 451 U.S. at 462 (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581-82 (1961)) (emphasis added), and this Court specifically rejected the notion that "incrimination is complete once guilt has been adjudicated." *Id.* These principles are as relevant to the sentencing proceedings in this case as they are to the sentencing proceedings in a capital case; the only distinction that *Estelle* implies is one of magnitude, not kind. Put simply, the Fifth Amendment right against self-incrimination is a clear constitutional right and cannot be dismissively recharacterized as only a "procedural protection." The only questions that this Court need ask before applying it, in this case or in any other case, are: (1) whether there is a danger of self-incrimination; and (2) whether it is in the context of a criminal case. Respondent does not contest that both criteria are satisfied in this case, and thus gives this Court no basis for limiting *Estelle* to capital sentencing.

That *Estelle* did not foreclose its extension to the non-capital context is further evident from the sole case that Respondent offers on this point, *Monge* v. *California*, 118 S. Ct. 2246 (1998). In *Monge* this Court drew a distinction between capital and non-capital cases, but did so in a way that contrasts so starkly with the present case as to

demonstrate that it is clearly inappropriate to draw such a distinction here.

In *Monge*, this Court considered the "narrow exception" of *Bullington* v. *Missouri*, 451 U.S. 430 (1981), which provided that when a capital defendant is sentenced to life imprisonment in his first, flawed trial, double jeopardy considerations prevent the State from seeking the death penalty in his retrial. The *Bullington* Court acknowledged that this was different than non-capital cases, because the Double Jeopardy Clause had long been held not to protect non-capital defendants from receiving a harsher sentence upon retrial. This is because the first, lighter sentence is not an "acquittal" that generates double jeopardy protection. See *id.* at 438. In the capital context, by contrast, factors such as the jury's binary discretion and the high standard of proof applied to the evidence mean that sentencing is "like [a] trial" for the purposes of the Double Jeopardy Clause, and that a life sentence is indeed like an acquittal. *Id.* at 438-39, 446. *Bullington* thus established an expressly "unique" procedural protection. Then, in *Monge*, this Court properly refused to extend *Bullington* to non-capital cases; doing so would have meant that the narrow exception had swallowed the well-settled rule. See *Monge*, 118 S. Ct. at 2251.

In *Estelle* (decided the same month as *Bullington*), this Court took a very different approach. Unlike *Bullington*, the Court in *Estelle* was writing on a clean slate, not seeking to carve out an exception to a venerable rule. Unlike *Bullington*, whose very basis was the *distinction* between capital and non-capital sentencing, *Estelle* rested on *general* sentencing principles. Unlike *Bullington*, which labored to analogize life sentences in capital cases to "acquittals" for double jeopardy purposes, *Estelle* needed no analogies to fit sentencing under the rubric of the "criminal case" referenced in the Self-Incrimination

Clause.[1] Capital sentencing fits *a fortiori*. In sum, when the *Monge* Court limited *Bullington* to the capital context, it recognized the limited nature of *Bullington*'s holding given the plain language of the Double Jeopardy Clause. If this Court were to limit *Estelle* similarly in this case, it would be completely rewriting *Estelle* while ignoring the even plainer language of the Self-Incrimination Clause.

B. Respondent's "Waiver" Cases All Deal Either With Grand Jury Proceedings Or With Cross-Examination At Trial, And Cannot Be Extended To Sentencing

Respondent's waiver argument – that a defendant who pleads guilty to offenses "waive[s] the right to remain silent about the details of those offenses" at sentencing, *Resp. Br.* at 13 – is spun from a series of inapplicable cases. Not only do Respondent's cited authorities have nothing to do with guilty pleas or sentencing, they are not even remotely analogous to this case.

Respondent begins with a tautology, pointing out that a guilty plea inherently acts as a waiver of the right against self-incrimination. *Resp. Br.* at 14. This is obvious, since a guilty plea is, by definition, an act of self-incrimination with regard to the elements of the offense charged. Once the criminal case has been completely resolved, furthermore, double jeopardy principles dictate that the defendant no longer faces incrimination with regard to that offense, and the defendant thus has no basis for

---

[1] As the *Estelle* Court put it, "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle*, 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967) (alteration in *Estelle*)). Respondent concedes that a statement by Petitioner would have invited exposure sufficient to implicate the Fifth Amendment. *Resp. Br.* at 13 n.4, 29.

refusing in another case to testify fully about the offense. Where there is still a *potential* for self-incrimination, by contrast, the right not to testify remains unscathed by the guilty plea. See *Resp. Br.* at 14 (citing cases that center on this distinction, but miscasting the cases as establishing a broader waiver principle).

Respondent then moves to the crux of its argument – that a guilty-pleading defendant "waives his Fifth Amendment privilege . . . as to all details of the offense, including those details that could affect the severity of his sentence." *Resp. Br.* at 15. This principle, we are told, is "well established in Fifth Amendment law." *Id.* However, this "well established" grounding consists of cases dealing with grand jury testimony, or with the scope of cross-examination of a witness who has chosen to testify at trial, but no cases that concern guilty pleas or sentencing.

Respondent's first case is *Rogers* v. *United States*, 340 U.S. 367 (1951), which Respondent says "stands for the general principle that '[d]isclosure of a fact waives the privilege as to details.' " *Resp. Br.* at 15 (quoting *Rogers*, 340 U.S. at 373). But this "general principle" is highly qualified by the language immediately preceding the phrase that Respondent quotes: "petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her." *Rogers*, 340 U.S. at 373. Thus, Respondent's citation obscures the true holding of *Rogers*, which concerned a *grand jury* witness who had already completely incriminated herself, but refused to testify regarding *another* person's activities. Since there was no possibility of further self-incrimination, there was no basis for the witness in *Rogers* to refuse to make a complete disclosure to the grand jury. It is *this* rather basic proposition for which *Rogers* stands, and nothing more.

Respondent further relies on *United States* v. *St. Pierre*, 132 F.2d 837 (2d Cir. 1942), another case that Respondent would have this Court believe applies to

sentencing and requires Petitioner to provide extensively detailed and broadly incriminatory testimony. In *St. Pierre*, however, the issue once again was testimony before a grand jury, where a defendant (who was already fully incriminated) refused to name his accomplice. *Id.* at 840. There was obviously no Fifth Amendment privilege left for the defendant, for the same reason as in *Rogers*: there simply was no possibility of further self-incrimination.

Faced with the inapplicability of these precedents, Respondent chooses simply to ignore the distinction between grand jury proceedings and trial and sentencing. Grand jury proceedings are inquisitorial, not adversarial. Grand jury witnesses, even putative defendants, are not entitled to have counsel present in the grand jury room, to challenge the witnesses against them, or indeed to put on a "defense" of any sort. They can either answer questions or, when applicable, plead the Fifth Amendment. It is hard to see, therefore, how *Rogers* and *St. Pierre*, which hold that grand jury witnesses with no possibility of further self-incrimination must testify completely, stand for the proposition that Petitioner must submit to similarly unlimited interrogation in a high-stakes adversarial sentencing proceeding.

The remainder of Respondent's cited authority deals with cross-examination of a witness who has chosen to take the stand at trial. It is indeed well-settled that a defendant who elects to testify cannot refuse to submit to cross-examination intended to probe that testimony. See *Ohio Adult Parole Auth.* v. *Woodard*, 118 S. Ct. 1244, 1252-53 (1998). Any other conclusion would be inconsistent with the adversarial system of fact-finding. But this tells us nothing about sentencing, or about defendants such as Petitioner who have not testified. As Respondent notes, this Court said in *Brown* v. *United States*, 356 U.S. 148, 155-56 (1958), that a defendant "cannot reasonably claim that the Fifth Amendment gives him . . . an immunity

from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." See *Resp. Br.* at 17-18. The concern, Respondent admits, is with witnesses who want to "present a one-sided account to the trier of fact." *Id.* at 17.

Respondent is far from the mark in claiming that such a concern arises in the sentencing context presented by this case. The prosecution, armed with facts adduced at another, related trial, was not in any way "ham-strung" or precluded from presenting its view of the pertinent facts. Petitioner, who had merely affirmed those agreed-upon facts proffered *jointly* at the plea hearing, offered no testimony that could have been the proper subject of cross-examination. Accordingly, Petitioner has chosen simply to put the prosecution to its proof without her assistance, the *precise* choice that the Fifth Amendment is designed to allow her to make.

C. The "Single Proceeding" Rule Does Not Apply

Respondent offers up another ambitious reinterpretation of criminal jurisprudence when it suggests that, because a waiver of Fifth Amendment rights is limited to the proceeding in which it is made, a guilty plea necessarily waives Fifth Amendment rights at sentencing. See *Resp. Br.* at 28-31.

As Respondent correctly notes, this "single proceeding" rule is designed "to protect a witness against changed circumstances – such as a change in the law or in the focus of inquiry." *Resp. Br.* at 28; see, e.g., *United States* v. *Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979) (waiver in grand jury proceedings does not extend to resultant trial), *cert. denied*, 446 U.S. 935 (1980); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972) (waiver in witness's trial does not extend to co-conspirator's trial), *cert. denied*, 409

U.S. 1128 (1973). As Respondent also notes, the rule has been applied widely to allow a guilty-pleading defendant awaiting sentencing to decline to testify in a co-defendant's trial. See *Resp. Br.* at 30 (citing five such cases).

Respondent's argument is an illogical inversion of the single proceeding rule, in two ways. First, the rule is a shield for witnesses that limits the scope of their waiver; Respondent would convert the rule into a sword that expands the waiver. Second, there is no logical connection between restricting a waiver to certain boundaries, and applying the waiver anywhere and everywhere within those boundaries. That is, just because an impermeable border surrounds a "proceeding," preventing the application of a waiver in another proceeding, this does not necessarily mean that there are not other such borders *within* the first proceeding, restricting the waiver to only certain aspects of it. Just as other proceedings may represent changes in law or focus, so too does sentencing represent such a change *within* a proceeding.

Indeed, because of these changes in law and focus at sentencing, this Court need not even conclude that a plea hearing and a trial are the same "proceeding" for purposes of the rule. Plea hearings and sentencing are directed toward different ends (finding a factual basis adequate to tie the defendant to the indictment, versus developing a complete picture of the offender to determine his actual fate), use different standards of proof (minimal support versus a preponderance of the evidence) and use different methods of inquiry (inquisitorial versus adversarial proceedings).[2] In this case, the change in focus could not be starker – total drug quantity was

[2] All of this is another way of looking at the point stressed above that the Fifth Amendment privilege requires the possibility of incrimination; if the change in focus or law means that the specter of incrimination reappears, the Fifth Amendment right reappears as well.

irrelevant at the plea hearing (which is why it was not covered there), but was a central theme of sentencing, with an extended term of imprisonment for Petitioner riding on the outcome. In short, the law and focus of a plea hearing is quite clearly changed in sentencing, and so the two are separate "proceedings."

Furthermore, while Respondent focuses only on sentencing proceedings in open court, just as important in the sentencing process is the preparation of the presentence report by the probation officer who interviews the defendant (among others). Respondent ignores this issue, but Respondent's position would strip defendants of Fifth Amendment protection in this obviously "separate proceeding," and would turn the probation officer – the only non-constitutional officer in the sentencing process – into an inquisitor of unprecedented power.

Based on all of these things, it is not surprising that Respondent can find no case in which the "single proceeding" rule is inverted and used to narrow rather than expand the scope of the Fifth Amendment right. This case surely should not become the first.

II. RESPONDENT'S VIEW OF THE RULE 11 PROCESS IS MISGUIDED AND UNPRECEDENTED

A. Respondent Overstates The Extent Of The Judicial Inquiry Mandated By Rule 11

Respondent is correct that Rule 11(f) requires courts to assemble a factual basis that is adequate to support a guilty plea. See *Resp. Br.* at 22. Respondent is also correct that Rule 11(c)(5) foresees the possibility of the court questioning the defendant under oath about the offense. See *id*. However, nothing in either the cases cited, the text of Rule 11, or common practice supports Respondent's view that a searching and "intense inquiry" of all the details of the defendant's conduct, including facts relevant only to sentencing and not the elements of the

offense, must be part of the determination under Rule 11(f). Respondent's view of the Rule 11 process is bizarre to say the least, and Respondent's implication that Rule 11 standards intended to *protect* the rights of defendants are actually the basis for *destroying* the rights of those defendants is truly breathtaking.

As Respondent notes, Rule 11(f) requires the court to conduct an inquiry to satisfy itself that a factual basis exists to support the guilty plea. See *Resp. Br.* at 22-23. The purpose of this inquiry is self-evident – to make sure that the defendant has actually done what the state says he has done, and what he is pleading guilty to doing. It is obviously inconsistent with basic principles of due process for a court to accept a guilty plea when there is no basis to conclude that the defendant committed the offense charged. Thus, the Rule 11 inquiry is intended to *protect* the defendant from being "railroaded." See *United States* v. *Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992) (factual basis requirement intended to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge") (quoting FED. R. CRIM. P. 11 advisory committee's note (1966 Amendment)).

Respondent lists several purposes underlying the court's questioning of a defendant, *viz.*, making sure that the defendant understands possible defenses, removing confusion, making sure that the defendant really does want to plead guilty, and so on. See *Resp. Br.* at 23-25. These examples further demonstrate that the purpose of the inquiry is to protect the defendant, not to further investigate the offense, and certainly not to exact a total waiver of defendant's constitutional protections in the ongoing criminal process. As with the single proceeding rule, Respondent attempts to turn a constitutional shield into a prosecutorial sword.

The quantum of evidence necessary to constitute a factual basis has been held to be quite low. See *United States* v. *Tunning*, 69 F.3d 107, 114 (6th Cir. 1995) (preponderance of the evidence not required); *United States* v. *Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (same). Not only is the Rule 11 proceeding not a searching inquiry, it need not even be an inquiry of the defendant; a district court is permitted to assemble the factual basis by securing facts from a number of sources other than the defendant. See, e.g., *United States* v. *Graves*, 106 F.3d 342, 345 (10th Cir. 1997) (court may obtain factual basis from presentence report); *Tunning*, 69 F.3d at 112 (court may obtain factual basis from prosecutor's statement); see also *United States* v. *Baez*, 87 F.3d 805, 809 (6th Cir. 1996) (defendant's one word agreement to factual basis set forth in plea agreement suffices), *cert. denied*, 117 S. Ct. 405 (1996); *United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985) (defendant not required to confirm every allegation in indictment). Indeed, nothing in Rule 11 prohibits a court from accepting a plea of guilty in spite of a defendant's protestations of innocence. *North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970).[3]

These examples belie Respondent's characterization of a guilty plea as "testimony." This so-called "testimony" is typically just perfunctory affirmance of the facts as recited by the *prosecution*, not the detailed, heart-pouring confession portrayed by Respondent. *Cf. United States* v. *McCarthy*, 394 U.S. 459, 466 (1969) (defining guilty plea as "admission of all the elements of a formal criminal charge"). A guilty plea is not "testimony," and it does not represent an obligation, either at the plea hearing or at sentencing, to testify without limit regarding the details

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[3] Alternately, the district court can simply decline to accept the plea. *See Alford*, 400 U.S. at 38 n.11.

of the offense.[4] The goal of Rule 11(f) is to make certain that some evidence exists as to the elements of the crime, nothing more. There is thus no foundation in law or policy to extend Rule 11 procedures to include inquiries into drug quantities that are not elements of the offense, but rather matters left for sentencing. It makes no sense to hold that a guilty plea opens the door to a no-holds-barred inquisition at sentencing.

Respondent offers no precedential basis for its position. The best that Respondent can do is offer the rhetorical point that:

> If the court can require the defendant who pleads guilty to reveal the details of the crime without violating any Fifth Amendment privilege – as a reasonable application of Rule 11 requires – it would make little sense to permit the defendant to rely on the Fifth Amendment at sentencing to withhold the same details.

Resp. Br. at 27. The three misstatements in this passage sum up why Respondent's waiver argument must fail. First, as shown by *Alford*, there is no requirement that the

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[4] Nor is it meaningful for Respondent to analogize a plea to a "confession." *See Resp. Br.* at 9, 14. For one thing, *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969), from which Respondent's strategically abridged quotation is drawn, equated guilty pleas with confessions in the sense of being an act of admission, not in the sense of being fact-intensive personal statements. At any rate, the quoted passage in *Boykin* dealt with methods of determining the voluntariness of guilty pleas, not with their confessional nature.

Furthermore, though a defendant whose confession has been introduced into evidence may have compelling strategic reasons to take the stand and testify, there is no authority for the position, parallel to Respondent's, that the earlier confession *requires* the defendant to take the stand and incriminate himself further by filling in all missing details in which the prosecution is interested. *See Harrison* v. *United States*, 392 U.S. 219 (1968).

defendant reveal anything in a Rule 11 proceeding. Second, the Rule 11 inquiry is not concerned with the "details" of the crime, but rather with a skeletal factual basis sufficient to protect the defendant's rights. Third, Petitioner nowhere argues that the facts she admitted in the Rule 11 hearing cannot be used at sentencing. That is, "the same details" (such as they are) that emerged from the plea hearing are fair game in sentencing. Rather, Petitioner wishes to remain silent about unnecessary (from a Rule 11 standpoint) and unlimited *additional* details that were absent (indeed, expressly reserved) from the Rule 11 proceeding.[5]

Respondent's version of Rule 11 looks nothing like the process currently practiced in federal district courts, and this Court should not accept Respondent's invitation to rewrite Rule 11 procedure to make it so.

B. The Bounds Of The Waiver Rule Proposed By Respondent Are Untenable

It is when Respondent attempts to define the limits of its theory of Fifth Amendment waiver that its assertions are revealed most starkly as radical and untenable.

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[5] In contrast to Respondent's usual reluctance to cite authority that relates to sentencing, Respondent notes USSG § 3E1.1, which requires a defendant to provide a more expansive disclosure at sentencing of the offense conduct. *See Resp. Br.* at 20. Of course, § 3E1.1 governs downward adjustments for "acceptance of responsibility," which is not at issue in this case. The fact that Respondent believes that every defendant who enters a guilty plea is required to be as forthcoming as those defendants who are being treated more leniently for their openness highlights the absurdity of Respondent's theory. Respondent's argument also ignores that such an adjustment may be obtained through a plea pursuant to FED. R. CRIM. P. 11(e)(1)(C) and (e)(3), which specifies a particular offense level and either includes or does not include defendant's description of the offense conduct.

Noting the weight of case law that says that a guilty-pleading defendant awaiting sentencing can invoke the Fifth Amendment in a co-defendant's trial, Respondent argues that it is acceptable to allow such an invocation while forbidding it in the guilty pleader's own sentencing. See *Resp. Br.* at 30-31. However, the testimony is the same, and either the defendant is incriminating himself or he is not. There is no basis for Respondent's distinction.

Respondent then turns and stretches the bounds of its ill-considered new rule beyond all reasonable compass. Respondent contends that a defendant must give all relevant information "reasonably related" to his offense, even if that information relates to other crimes to which he has not pleaded guilty. See *Resp. Br.* at 18. Respondent takes the quoted phrase from *McGautha* v. *California*, 402 U.S. 183, 215 (1971), where this Court held that a defendant who chooses to testify must answer any questions on cross-examination that are reasonably related to the direct testimony. Thus, Respondent takes a cross-examination rule, designed to balance considerations of relevance with the demands of the adversary process, and turns it on its head in an unrelated context. In doing so, Respondent would allow the prosecution free rein to expand on *uncontested* testimony (indeed not even testimony, since it is generally just the defendant's affirmance of the facts as the *prosecution itself* has presented them), even if that expansion results in the defendant incriminating himself in several other, tangentially related crimes.[6]

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[6] Respondent argues that Petitioner failed to articulate this as a basis for invoking the Fifth Amendment and therefore waived the "other crimes" rationale for seeking protection of the Fifth Amendment. There is no such waiver here. Petitioner simply invoked the Fifth Amendment in its entirety and did not limit it to any specific bases. The district court did not inquire as to defendant's specific reasons for invoking the Fifth Amendment, taking it for granted that an ample basis existed, and focusing instead on the waiver question. This Court has long been loathe to find waiver by implication once the protections of the Fifth Amendment are sought. *See, e.g., Emspak* v. *United States*, 349 U.S. 190, 195-98 (1955); *Smith* v. *United States*, 337 U.S. 137, 150-51 (1949).

Respondent apparently notices that no reasonable defendant would (or has) chosen such a path, and offers in reply the unpersuasive assertion that, if a defendant is not willing to divulge all of the details of his crime (including those that might implicate him in other crimes) he can simply not plead guilty and instead go to trial. *Resp. Br.* at 19. Apparently, Respondent finds untenable a third path – in between divulging every single detail related to one's conduct on the one hand, and denying responsibility on the other – of admitting to the offense as charged but exercising one's right to an adversarial sentencing proceeding. Respondent thus changes sentencing from an adversarial to an inquisitorial system, and refuses to accept the true nature of the guilty plea in our system.

Respondent's inability to draw sensible limits on its proposal for the deprivation of Fifth Amendment rights shows that its view of Rule 11 and sentencing is not tenable, and that Petitioner must prevail.

III. REGARDLESS OF WHETHER A GUILTY PLEA CAN SERVE TO WAIVE THE RIGHT AGAINST SELF-INCRIMINATION, THERE WAS NO WAIVER IN THIS CASE

Given the shaky foundations on which Respondent's waiver argument is built, it is not surprising that Respondent largely ignores three factual elements that weaken the logical basis for a finding of waiver in this particular case. That is, even if this Court were to rewrite *Estelle* and

accept Respondent's waiver argument as a general matter, there would still be compelling due process reasons to find that there was no waiver by Petitioner in this case.

The first factor that Respondent attempts to finesse is Petitioner's specific reservation in her guilty plea (J.A. 38-39). When entering her guilty plea, Petitioner explicitly reserved the right to contest the quantity of drugs attributed to her. This did not prevent her from pleading guilty to the offense charged; it is uncontested that a quantity of drugs was involved, and the sole question, unrelated to any element of the offense, was how much.

Petitioner's reservation on the quantity issue was strikingly specific, and such reservations are hardly uncommon in the annals of criminal law. *Cf.* FED. R. CRIM. P. 11(a)(2) (allowing conditional guilty pleas, reserving right to appeal particular issues). The district court understood and readily accepted Petitioner's reservation, and the reservation underscores the adversarial nature of the sentencing fact-finding process. Given how typical these proceedings were, it is quite striking that Respondent believes that Petitioner's guilty plea converted the sentencing hearing into an inquisitorial process, in which Petitioner suddenly bore the responsibility of answering to the court and accounting for all of the drugs incidentally involved in her criminal conduct. Petitioner no doubt would have been quite surprised to be told that her reservation was such a spectacular exercise in futility. So too, no doubt, would the countless defendants every day who plead guilty but contest their sentences, or who reserve a particular issue to contest on appeal.

Respondent believes otherwise, arguing that "[a] defendant who wishes to confess to the crime and permit the court to enter judgment on the plea cannot control the scope of his waiver any more than a witness who elects to testify can dictate the scope of his cross-examination."

Resp. Br. at 34.[7] Not only does Respondent's belief ignore the widespread practice of conditional pleas and reservations of sentencing issues, it also ignores this Court's recognition of a defendant's ability to plead guilty while admitting nothing and putting the prosecution to its proof. See *Alford*, 400 U.S. at 38 (accepting guilty plea "[i]n view of the strong factual basis for the plea demonstrated by the State and [defendant's] clearly expressed desire to enter it despite his professed belief in his innocence"). Furthermore, it does not fit with this Court's recognition of a defendant's ability to concede guilt on one element of an offense, and foreclose the prosecution's attempt to introduce duplicative and prejudicial evidence. See *Old Chief* v. *United States*, 117 S. Ct. 644, 647 (1997). In all of these contexts, defendants exercise significant control over the extent to which they waive their rights.

Respondent concludes with the feeble rejoinder that, while Petitioner's reservation may have served to put the prosecution to its proof, it did not prevent her silence from being held against her. See *Resp. Br.* at 34. This untenable distinction reveals Respondent's misunderstanding of the Fifth Amendment. If a defendant's silence is held against her, she is forced (choosing the third part of the cruel trilemma of contempt, perjury, and self-incrimination) to be a witness against herself. And if she is forced to be a witness against herself, the prosecution is not put to its proof. To quote again from *Estelle*, the "essence" of the Fifth Amendment protection against self-incrimination is "the requirement that the State . . . produce the evidence . . . by the independent labor of its officers, not by the simple, cruel expedient of forcing it

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[7] Respondent here continues its baffling persistence in analogizing the act of pleading guilty to "testimony," an issue discussed above.

from [the defendant's] own lips." *Estelle*, 451 U.S. at 462 (quotation marks omitted). To accept Respondent's rejoinder would not only force incriminating evidence from Petitioner's own lips, but would do so after tricking her into believing that she had reserved the right to contest her sentence. *This* is the sort of "gamesmanship" that this Court properly disdains in the context of guilty pleas. See *Resp. Br.* at 27-28; see also *United States* v. *Hyde*, 117 S. Ct. 1630, 1634 (1997) (decrying view of Rule 11 process that would "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess").

The trickery would not end with the acceptance of the reservation. When the district court read Petitioner the litany of rights that she *was* waiving, included in the list was the right to remain silent "at trial" (J.A. 45). The district court explicitly stated that some of the rights being waived were "pre-trial" rights, while others were "trial" rights (J.A. 43-45). That no post-trial rights are mentioned sent a clear message that no post-trial rights were waived.

Respondent's answer on this issue is to quote *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995), where this Court held that, with the exception of those rights Rule 11 specifically requires the court to discuss with the defendant, it is counsel's responsibility to apprise a defendant of his rights. *Resp. Br.* at 33. But it cannot have been the responsibility of counsel to have apprised Petitioner that she had waived her right to remain silent at sentencing, because (as the Third Circuit itself noted) before the appellate decision in this case, the circuits were unanimous that defendants like Petitioner did *not* waive their Fifth Amendment rights (J.A. 122-23).

Libretti more directly frowns upon the third aspect unique to this case – the explicit statement by the district court at sentencing that Petitioner did not have to testify. If Petitioner had any notion that she might have waived

her Fifth Amendment rights for sentencing purposes, that notion would have been dispelled when the following exchange took place:

> THE COURT: Mr. Morley, so you have any other witnesses you wish to call?
>
> MR. MORLEY: No, Judge.
>
> THE COURT: Are you – your client should – especially in a factual context like this, your client – she may testify if she wishes, but she may remain silent.

(J.A. 79). As *Libretti* held in an analogous situation, "a district judge must not mislead a defendant regarding the procedures to be followed . . . , nor should the court permit a defendant's obvious confusion about those procedures to stand uncorrected." *Libretti*, 516 U.S. at 51. In this case, Petitioner was led to believe that she had the right to decline to testify, when her reservation was accepted, when her right to remain silent *at trial* only was waived, and when the district court told her she could remain silent at sentencing. Only when it was too late did the district court announce that the right did not exist after all (J.A. 93).

Based on these three factors, even if this Court somehow concludes that a guilty plea acts as a Fifth Amendment waiver through sentencing, this Court cannot conclude that such rights were waived knowingly, voluntarily, or intelligently in this case.

CONCLUSION

Respondent's arguments, if accepted by this Court, would radically restructure the current practice of accepting guilty pleas in the federal district courts. In abrogating a right plainly established by this Court in *Estelle*, Respondent would vastly increase the risk to defendants in pleading guilty, give to the court and probation officers new and untested inquisitorial powers, and dissuade

defendants from entering pleas based upon a reservation of issues for sentencing. This Court's principles and jurisprudence require no such result, and this Court should reverse and remand for resentencing.

Respectfully submitted,

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October 26, 1998

No. 97-7541

In The

Supreme Court of the United States

October Term, 1997

AMANDA MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Petitioner pleaded guilty to non-capital charges. At sentencing, the court imposed a ten-year mandatory minimum term expressly predicated on the adverse inference it drew from her silence concerning the quantity of drugs "involved" in her conspiracy offense.

Does the Fifth Amendment privilege protect the defendant against increased punishment based on the court's drawing of an adverse inference from her silence at sentencing?

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF PETITIONER

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION file this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner Amanda Mitchell's assertion of rights under the Fifth Amendment. Both petitioner and respondent have granted amici NACDL and FAMM consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation founded 40 years ago, numbering some 10,000 attorneys, including citizens of every state. The NACDL has over 70 state and local affiliates with a combined membership of about 28,000.

NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. The American Bar Association

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, FAMM and their members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the defense of the Fifth Amendment privilege against compulsory self-incrimination, as one of the constitutional provisions which is least understood and appreciated by the lay public, yet which is of the highest value in the preservation of a free society which respects the dignity and autonomy of every individual, including the criminally accused and suspected.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 21 U.S.C. § 841(b) is the primary federal example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function unwisely from the judiciary to the prosecution. Founded in 1991, FAMM has over 33,000 members nationwide, constituting over 25 chapters in as many states and the District of Columbia. FAMM does not contend that crime should go unpunished, but rather that the punishment should fit the crime. FAMM and its members are deeply troubled that the Third Circuit's narrowing of the Fifth Amendment privilege in this case has allowed the application of

a mandatory minimum sentence that would not otherwise apply.

SUMMARY OF ARGUMENT

A criminal defendant who has pleaded guilty retains the right to invoke the Fifth Amendment privilege against being compelled to be a witness against herself at sentencing. The Third Circuit erred in affirming an increased sentence that was expressly predicated on drawing an adverse inference from the defendant-petitioner's silence.

The clause applies by its terms to petitioner's failure to counter the assertions of cooperating accomplice witnesses about the amount of drugs "involv[ed]," 21 U.S.C. § 841(b)(1)(A), under the federal mandatory minimum sentencing law, in her violation of the controlled substance conspiracy statute, *id.* § 846. Sentencing occurs "in a criminal case," and when the court draws an adverse inference from silence, it is imposing compulsion "to be a witness." Information that increases a defendant's sentence is used "against" her. Nothing in the language of the Amendment itself demands that there also be a risk of "self-incrimination" on the substance of the charges.

Even if the Fifth Amendment privilege protects only against a "real and substantial risk of self-incrimination," *Marchetti v. United States*, 390 U.S. 39, 48 (1968), the privilege was not inapplicable on the basis that petitioner had pleaded guilty. At the time of the plea she did not waive her Fifth Amendment right of silence except to the extent necessary to enter the plea; that is, she only waived the right to remain absent from the witness stand at trial had

she adhered to her initial plea of not guilty. Fed.R.Crim.P. 11(c)(3). Petitioner's plea did not waive her right to appeal, and during the sentencing hearing her conviction was not yet final.

It should have been evident to the sentencing court, even without an assertion to this effect, that petitioner's answers to the judge's questions could also have incriminated her on several criminal charges beyond those to which she had pleaded guilty. In that circumstance, this Court's cases do not require her to explain the basis of her claim of the constitutional privilege or limit the validity of the claim to the bases her counsel may assert. *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The judgment below must be reversed.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE PROTECTS A CRIMINAL DEFENDANT WHO HAS PLEADED GUILTY AGAINST THE DRAWING OF AN ADVERSE INFERENCE WHICH IS USED TO INCREASE HER SENTENCE.

Petitioner Mitchell pleaded guilty to all counts against her in the indictment but asserted a right not to provide information that could subject her to increased punishment in either this case or in another, later prosecution. The sentencing judge held that this refusal warranted the drawing of an adverse inference that tipped the balance to satisfy the government's burden of establishing that the extent of her conduct created liability for

a conspiracy, in violation of 21 U.S.C. § 846, "involving" more than five kilograms of cocaine, resulting in the imposition of a mandatory minimum ten-year term. 21 U.S.C. § 841(b)(1)(A).[2] Without this inference, the record does not show that the district court, sitting as factfinder for sentencing purposes, would have found the government's cooperating witnesses sufficiently credible, in their description of petitioner's involvement, to support the same conclusion. Pet. Appx. 6-7; *United States v. Mitchell*, 122 F.3d 185, 188 (1997).[3] The guideline sentence, as

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[2] Petitioner was also convicted on three counts of violating 21 U.S.C. § 860 (distribution of controlled substance within 1000 feet of a school). None of these counts "involved" an amount of cocaine sufficient to trigger a mandatory minimum term. In the absence of an overriding mandatory minimum, the U.S. Sentencing Guidelines would call for equal, concurrent sentences (*see* USSG § 5G1.2(b), (c)) based on the aggregate amount of controlled substances deemed "relevant," that is, the amount for which petitioner was individually responsible. This would include amounts of controlled substances foreseeably distributed by others "in furtherance of the jointly undertaken criminal activity," USSG § 1B1.3(a)(1)(B), that were "part of the same course of conduct or common scheme or plan as the offense[s] of conviction." *Id.* § 1B1.3(a)(2). Based on the quantity of cocaine attributed to petitioner by the sentencing court on the basis of the adverse inference it drew from her silence, the guideline range without regard to the ten-year mandatory minimum would have been 97 to 121 months. *United States v. Mitchell*, 122 F.3d 185, 186 (1997).

[3] Thus, if the courts below committed constitutional error, it could not be deemed harmless under any standard, much less harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 254 (1969); *Chapman v. California*, 386 U.S. 18, 24 (1967).

urged by the defense, would otherwise not have exceeded two and a half years' imprisonment.

The Third Circuit affirmed on the basis that the Fifth Amendment's privilege against compulsory self-incrimination does not apply at sentencing following a guilty plea. Pet. Appx.; *United States v. Mitchell*, 122 F.3d at 188-91 (1997). Judge Michel, sitting by designation, concurred in the result only.[4] Four Circuit Judges (Becker, Scirica, Mansmann and Nygaard, JJ.) dissented from denial of rehearing in banc. Commentators immediately noticed that the Third Circuit's opinion in this case:

> marked a dramatic departure from the overwhelming weight of case law. Every other circuit that has ruled on this issue has decided that a defendant retains her Fifth Amendment privilege if her testimony could be used to increase her sentence.

Recent Cases, 111 Harv.L.Rev. 1140, 1142 (1998) (noting and sharply criticizing decision below).[5]

The erroneous decision of the court below has enormous institutional significance. Over 90% of federal criminal defendants whose cases are not dismissed plead guilty. Bureau of Justice Statistics, *Sourcebook of Criminal*

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[4] Judge Michel recognized that the decision in this case "create[s] an apparent split among Circuits." 122 F.3d at 192.

[5] The Harvard student author counts seven circuits to the contrary of the court below, along with "[m]ost state courts." 111 Harv.L.Rev. at 1142-43 n.32.

Justice Statistics 1996, at 448 (24th ed., U.S. Dept. of Justice, 1997) (table 5.27).[6] In the vast majority of federal cases, sentencing is realistically the most important issue. Conduct the defendant has not admitted and for which she has not been convicted at trial can add years to her punishment in the most routine of cases. USSG § 1B1.3 ("relevant conduct" rule); see *United States v. Watts*, 519 U.S. 148 (1997) (per curiam); *United States v. Witte*, 515 U.S. 389 (1995). "The Sentencing Guidelines instruct *the judge* in a case like this one to determine . . . the amount . . . of 'controlled substances' for which a defendant should be held accountable. . . ." *Edwards v. United States*, 523 U.S. --, 140 L.Ed.2d 703, 708, 118 S.Ct. 1475 (1998) (emphasis original).

The circuits which have addressed the issue are unanimous in holding that the amount of drugs that counts in a 21 U.S.C. § 846 conspiracy case to trigger a mandatory minimum term under the "case . . . involving" language of § 841(b)(1)(A) is subject to a "relevant conduct" analysis judicially borrowed from section 1B1.3 of the Guidelines.[7] *Cf. Edwards*, 140 L.Ed.2d at 708. The

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[6] Of 60,255 total federal defendants in 1996, the cases of 7083 were dismissed for various reasons. Of the remaining 53,172 defendants, 48,196 (90.6%) pleaded guilty or nolo contendere. Thus, in total, 80% of federal cases ended in guilty pleas (48,196/60,255); of all those convicted, 92% were convicted by plea. *Id.*

[7] *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995); *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993); *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1993); *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992).

court's imposition of a mandatory minimum ten-year term at petitioner's sentencing, predicated on the district judge's determination of the amount of drugs "involv[ed]" in her part of the conspiracy, was critically based on the adverse inference it drew from her silence.

Because the decision below is incompatible with the language of the Fifth Amendment and with this Court's precedent, the judgment of the court below must be reversed.

1. The Decision Below Is Unsupported by this Court's Prior Cases and Is Contrary to the Policies of the Fifth Amendment Privilege.

Because the "Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' " *Estelle v. Smith*, 451 U.S. 454, 468 (1981) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)), the defendant must have a right to remain silent without penalty at sentencing. That position is most consistent with this Court's precedent, which has never directly addressed the point. In *Estelle v. Smith*, this Court considered statements the defendant made during a court-ordered competency evaluation. The psychiatrist's observations were later used in support of the state's claim for a death penalty. This Court held the statements inadmissible under the Fifth Amendment in the absence of the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Smith*, 451 U.S. at 461-69.[8]

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[8] The Court also held that the Sixth Amendment requires, in this context, that defense counsel be notified in advance of the planned interview. 451 U.S. at 469-72. Then-Justice Rehnquist concurred in the judgment on Sixth Amendment grounds but disagreed with respect to the applicability of the Fifth Amendment to punishment issues. 451 U.S. at 474-76. No other Justice joined in that position, which the court below effectively adopted, albeit without even citing *Estelle v. Smith*.

The majority in *Smith* reaffirmed the Court's long-held position:

> that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'

451 U.S. at 462-63 (citations omitted).[9] The "proceeding" in *Smith* was the sentencing phase of a capital case, but nothing in the Court's rationale suggests any basis to limit that decision to capital proceedings, nor does anything in the text or the purpose of the Fifth Amendment's self-incrimination clause. *Cf. Delo v. Lashley*, 507 U.S. 272, 286 n.7 (1993); *Gardner v. Florida*, 430 U.S. 349, 357-60 (1977) (plurality) (discussing circumstances in which "process" which is "due" may vary according to whether it is "life" or "liberty" of which the state seeks to deprive the citizen).

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[9] The Court reserved decision on the question whether, in other contexts, *Miranda* warnings are always required when a convicted defendant is interviewed in custody to obtain information for sentencing. *Smith*, 451 U.S. at 469 n.13. In that reservation, the Court did not intimate doubt about the applicability *vel non* of the Fifth Amendment privilege at the sentencing stage of a "criminal case"; the concern was with such *Miranda*-related matters as "custody" and "interrogation."

Likewise, in *Roberts v. United States*, 445 U.S. 552, 559-61 (1980), the Court rejected a claim that the defendant could remain silent at sentencing without penalty, on the sole ground that the constitutional privilege had not been contemporaneously invoked. No Justice suggested that analysis of a forfeiture of the right was irrelevant because the Fifth Amendment privilege was inapplicable.[10]

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[10] In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), while discussing the question whether the Fourth Amendment regulated the conduct of American officials operating against non-citizens on foreign territory, the Court's dictum described the Fifth Amendment privilege as "a fundamental trial right of criminal defendants," and commented that a "violation [of the privilege] occurs only at trial." *Id.* at 264. The Court was not discussing in that passage the possibility of a Fifth Amendment violation occurring at sentencing, but rather was contrasting the operation of the Fifth Amendment privilege, which operates *in* the courtroom, with the Fourth, which directly regulates the conduct of law enforcement officials in the field. The Court's citation to *Kastigar v. United States*, 406 U.S. 441, 453 (1972) , as authority for that assertion further shows that the Court was not suggesting that a violation of the Fifth Amendment privilege could only be consummated by the use of compelled testimony during a trial. (Nor would anyone argue that the privilege was inapplicable at a bail hearing, a suppression hearing, a hearing on post-trial motions, or any other proceeding "in [the] criminal case" but which is not part of the trial.) The cited page of *Kastigar* asserts that the privilege bars "prosecutorial authorities from using the compelled testimony in *any* respect" (emphasis original), so as to insure "that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* The focus on "penalties" rather than on conviction itself is attributed in *Kastigar* to authorities spanning nearly a century of precedent. *Id.* at 453 & n.38.

This Court has had recent occasion to elaborate and explore the interrelated policies served by the Fifth Amendment privilege. These reflect "many of our fundamental values and most noble aspirations. . . . " *United States v. Balsys*, 524 U.S. --, 118 S.Ct. 2218, 2231 (1998), quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Most if not all of these are equally applicable to compulsion imposed at sentencing to reveal punishment-enhancing facts about one's own activities:

> the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by . . . requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life[; and] our distrust of self-deprecatory statements;. . . .

118 S.Ct. at 2231. While the Guidelines system placed the burden of proving the extent of petitioner's conduct on the government for sentencing purposes, her own silence was used to effectively reverse that burden. The sentencing thus became essentially inquisitorial, involving an attempt to force the petitioner into degrading self-accusation that would potentially expose her to a four-fold increase in punishment. The Constitution prohibits such cruel compulsion.

Not only is petitioner Mitchell's Fifth Amendment claim consistent with precedent and principle, but it is

also supported by the actual language of the Fifth Amendment privilege.[11] For these reasons, the judgment of the Third Circuit must be reversed.

2. The Plain Language of the Fifth Amendment Applies Between Conviction and Sentencing Without Regard to the Risk of Incrimination for Other Offenses.

The Fifth Amendment protects every "person" against being "compelled in any criminal case to be a witness against himself." If the defendant must choose between testifying and facing greater punishment, there is Fifth Amendment compulsion. The court below professed that it could "see nothing in the Fifth Amendment . . . that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction." 122 F.3d at 191. But under the plain language of the amendment, "self-incrimination" is not

[11] Although this case arises out of a federal criminal prosecution, it does not seem possible for this Court to avoid the constitutional question on statutory grounds. The question whether the defendant may, without adverse inference, remain silent at sentencing is not addressed in Fed.R.Crim.P. 32 or in the United States Sentencing Guidelines' procedural provisions (*see* USSG ch. 6.A.), nor is it addressed by 18 U.S.C. § 3481 ("*In trial* of all persons charged with the commission of offenses against the United States . . . , the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.") (emphasis added); see generally *Bruno v. United States*, 308 U.S. 287 (1939).

the sole test. The core guarantee of the Fifth Amendment privilege is against being compelled "in a criminal case" to "be a witness against" oneself. *Counselman v. Hitchcock*, 142 U.S. at 562. "Where there has been genuine compulsion of testimony, the right has been given broad scope." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

Sentencing surely occurs "in" the "criminal case," and the adverse inference applied against petitioner Mitchell "compelled" her to "be a witness against" herself at that proceeding. See *James v. Kentucky*, 466 U.S. 341, 344 (1984) ("to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so"); accord, *Carter v. Kentucky*, 450 U.S. 288 (1981); see also *Griffin v. California*, 380 U.S. 609 (1965). Sentencing judges, like juries, are bound to reject the unconstitutional inference.

Under the Third Circuit's holding there is nothing to stop a prosecutor from calling the defendant to the witness stand at sentencing and moving for contempt if she refuses to answer punishment-enhancing questions, or even from calling the defendant before a grand jury after conviction and prior to sentencing. Authorities on the grand jury all agree that such possibilities are inconsistent with the constitutional privilege. *See* Sara S. Beale, Wm. C. Bryson, *et al.*, 1 Grand Jury Law and Practice § 6:10, at 6-80 (2d ed. 1997) (citing 3 circuits and 6 states); Grand Jury Project, 1 Representation of Witnesses Before Federal Grand Juries § 8.5(e), at 8-19 (3d ed. R.J. Klieman rev. 1998).

Indeed, if the lower court were right, the prosecutor could use testimony immunized under 18 U.S.C. § 6002 against that witness at his or her subsequent sentencing. This Court's decision upholding the constitutionality of that statute holds any such practice invalid. "Immunity [under the federal act] . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (emphasis original).

The decision below would also compel a defendant's response to every inquiry of a U.S. Probation Officer in the presentence investigation, since there would be no privilege to withhold sentence-increasing responses. The better-reasoned authority holds otherwise. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982) (Fifth Amendment applies to presentence investigation interview of detained convict)[12]; accord, *United States v. Miller*, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting), *cert. denied*, 498 U.S. 1094 (1991); *cf. United States v. Cortes*, 922 F.2d 123, 126 (2d Cir. 1990) (rationale of contrary cases not "altogether persuasive").

The well-known catch-phrase "self-incrimination" does not appear in the Clause itself, and does not capture the full scope of the privilege. That expression is actually shorthand for an elaboration of the Amendment's literal

[12] Without deciding the *Miranda* issue, *id.* at 757 n.2, the *Jones* court granted habeas relief to a defendant who had been ordered by the court to cooperate and follow instructions in the presentence interview.

protection – an important development, to be sure, but still an extension of the language. The broader protection against "self-incrimination" that courts have fashioned to enforce the Fifth Amendment privilege explains why the right can also be invoked in *any* case, civil or criminal, when the potentially incriminating answers could be used against the witness in a future criminal case. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).[13] But in the criminal case itself, the defendant cannot even be called to the witness stand by the prosecutor, regardless of the nature of the questions to be asked, without literally violating the privilege against being made "a witness against himself" that applies "in a criminal case."[14]

[13] See also *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976) (Fifth Amendment claim available to prisoner in disciplinary proceeding, but adverse inference may be drawn); *Garner v. United States*, 424 U.S. 648, 658 (1976) (privilege may be claimed in response to question on tax return, but is waived if not invoked); *United States v. Kordel*, 397 U.S. 1 (1970) (available to civil litigant responding to interrogatories, but must be invoked); *Arndstein v. McCarthy*, 254 U.S. 71 (1920) (available to debtor in bankruptcy; dismissal of imprisoned contemnor's habeas corpus petition reversed), *clarified on denial of mtn. for interv. & rearg.*, 254 U.S. 379 (1920). Accord, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. --, 140 L.Ed.2d 387, 118 S.Ct. 1244 (1998) (adverse inference permissible from applicant's refusal to be interviewed in connection with clemency application, a nonjudicial, post-conviction process that is no longer "in [the] criminal case").

[14] By its text, the Fifth Amendment privilege against being compelled to be a witness against oneself "in any criminal case" applies fully at sentencing, regardless of whether the convicted defendant is then still an "accused" facing a "criminal prosecution" under the Sixth Amendment. See *United States v. Balsys*, 118 S.Ct. at 2222-23; *Counselman v. Hitchcock*, 142 U.S. at

Turning on its head a concept that was developed to ensure a fully effective application of the privilege, the court below employed the phrase "self-incrimination" as a device for narrowing the Amendment's core protection. That essential guarantee – the right of a criminal defendant to remain entirely silent and entirely absent from the witness stand in his or her own case – is ignored by the decision below. For this most basic reason, reversal is mandated.

3. A Guilty-Pleading Defendant Is Not Differently Situated from a Defendant Who Has Gone to Trial with Respect to Fifth Amendment Rights at Sentencing.

The right of any person to claim the Fifth Amendment privilege with respect to the instant offense should be held to apply until the "criminal case" terminates, that is, when the conviction becomes final. Thus, at least while the right of direct appeal remains available, the privilege survives.[15] The leading treatises agree. See, *e.g.*, 1 McCormick on Evidence § 121, at 440 (4th ed. J.W. Strong 1992);

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563 (scope of Sixth Amendment's application to "criminal prosecutions" is "much narrower" than Fifth Amendment's reference to "any criminal case"); *cf. Williams v. New York*, 337 U.S. 241 (1949) (due process clause does not require confrontation of witnesses, so as to preclude use of hearsay brought in through probation report at capital sentencing).

[15] A judgment of conviction "becomes final" on the date that direct appellate review, including certiorari to this Court, is completed, or the time to seek that review expires. See *Caspari v. Bohlen*, 510 U.S. 383, 390-91 (1994); *Graham v. Collins*, 506 U.S. 461, 467-68 (1993); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6

see also Annot. (Soeffing), "Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question," 9 A.L.R.3d 990 (1966 & 1996 Supp.). Under the Fifth Amendment, a defendant who has pleaded guilty but has not yet been sentenced is not situated any differently from one who has stood trial and may appeal for a retrial.

The court below cited *Reina v. United States*, 364 U.S. 507, 513 (1960), as if it supported a different conclusion, *see* 122 F.3d at 189, but that case is entirely inapposite. The petitioner there refused to testify before a grand jury after he had been convicted and sentenced, and had begun to serve the term imposed. This Court held that Reina's refusal to answer questions about his offense could be valid in relation to potential state charges, but that this risk had been removed by a grant of immunity. There is nothing in the holding of that case to support the decision below.

Contrary to the suggestion of the court below, statements compelled at sentencing may indeed tend to incriminate the defendant in the same case, notwithstanding the entry of a conviction upon accceptance of the plea. Even when the defendant has pleaded guilty, as

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(1987); *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam). And even if a line could be drawn earlier than the termination of the appellate process, it should at least be clear that during the sentencing proceedings, a conviction, whether by plea or verdict, is not final. Indeed, it could be argued that a risk of self-incrimination exists for at least a year *after* the termination of direct appeals, which is when the conviction lies beyond conventional challenge. *Cf.* 28 U.S.C. § 2255 (statute of limitations allowing one year after finality to bring motion to vacate).

here, a right of appeal remains, which may sometimes lead to a trial. This may occur if the defendant has moved to withdraw her plea before sentencing under Fed.R.Crim.P. 32(e) but has been denied, from which denial an appeal could arise. Even in the absence of such a motion, a defendant may nevertheless appeal on the basis of substantial defects in the Rule 11 colloquy, see *McCarthy v. United States*, 394 U.S. 459 (1969), or to challenge the factual basis for the plea, see *Henderson v. Morgan*, 426 U.S. 637 (1976); *North Carolina v. Alford*, 400 U.S. 25 (1970), or to claim a breach of a plea agreement; see *Santobello v. New York*, 404 U.S. 257 (1971). Any of these appeals may lead to vacatur of the plea and a trial on the underlying charge. Until the appeal terminates or the time to take a direct appeal expires, the defendant must be permitted to remain silent with respect to the underlying charges in the case.

The decision below not only misapprehended the risk of further incrimination after the acceptance of a guilty plea, but it also conflated that issue with the distinctly separate question of waiver. 122 F.3d at 191. The Fifth Amendment privilege is not forfeited, as to all matters related to the crime of conviction, by the mere fact of the plea itself. A "waiver" of the privilege by testifying on a certain subject is binding only during the same "proceeding," meaning that particular stage of the case.[16] *See*

[16] The United States conceded this point in answering the petition for certiorari, Brief in Opp. at 13-14, but failed to recognize that sentencing is a different "proceeding" under this doctrine from the change of plea hearing. Thus, even if the clause of Fed.R.Crim.P. 11(c)(5) that allows the district court to question the defendant under oath "about the offense to which the defendant has pleaded," does not allow the defendant to invoke the Constitution to decline to answer those questions, it is only because that colloquy occurs in the "same proceeding" as the plea itself and involves an inquiry into the "details" of what the plea itself necessarily admits. *Rogers v. United States*, 340 U.S. 367, 373 (1951).

Annot. (DiSabatino), "Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings," 42 A.L.R.Fed. 793 (1979). See generally *Brown v. United States*, 356 U.S. 148 (1958) (defendant may not testify in own defense but decline to be cross-examined in reliance on Fifth Amendment).

When the courts say that a defendant waives his or her rights under the Fifth Amendment by pleading guilty, they mean only that the defendant may choose not to plead guilty, and instead may stand on the right to remain silent and put the government to its proof of the elements; in other words, that the defendant may refuse to change her plea and may insist instead on the Sixth Amendment right to trial. See, *e.g.*, *Parke v. Raley*, 506 U.S. 20 (1992); *Boykin v. Alabama*, 395 U.S. 238 (1969).

That dictum does not mean that the guilty-pleading defendant no longer has any Fifth Amendment rights in relation to the general subject matter of the offenses of conviction. Nor does it mean that at a later stage, such as sentencing, the waiver implicit in the change of plea itself still obtains. *See* Recent Cases, 111 Harv.L.Rev. at 1143-44. The standard plea colloquy under Federal Criminal Rule 11, as followed in this case (the record shows), only warns the defendant, so far as the Fifth Amendment

privilege is concerned, that by pleading guilty she gives up the right to trial, "and *at that trial* . . . the right against compelled self-incrimination. . . . " Fed.R.Crim.P. 11(c)(3). No broader waiver of petitioner's Fifth Amendment rights was secured when she pleaded guilty, nor could any judge insist on a broader waiver as a condition of accepting the plea.

The use of an adverse inference to tip the balance against petitioner in the computation of drug quantities necessary to trigger a mandatory minimum sentence (or to establish "relevant conduct" justifying an increased guideline sentence) was therefore unconstitutional notwithstanding her plea of guilty.

4. Petitioner, Like Virtually Every Federal Defendant, Risked Self-Incrimination at Sentencing on Numerous Other Offenses.

Apart from the validity of petitioner Mitchell's claim of a Fifth Amendment privilege at sentencing with respect to the offense of conviction, her claim should have been sustained in view of the sundry other crimes for which she could still be prosecuted. The court below was mistaken in distinguishing this case from others on the basis that "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." 122 F.3d at 191. She had no burden to make that claim. Whenever the risk of self-incrimination is apparent, a court must sustain the assertion of the privilege. *Malloy v. Hogan*, 378 U.S. at 14, quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

In *Hoffman*, this Court ruled that a witness may not be required to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." 341 U.S. at 488. The self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." *Id.* at 486. The decision below ignored the established precept that while the defendant or witness bears the burden of claiming the privilege, only in the atypical situation where it is not evident from the questions and their context where the potential for self-incrimination may lie should the court demand that the witness proffer the basis for the constitutional claim.[17] Even then, under *Hoffman*, the claimant does not bear the ultimate burden of establishing the claim of privilege. The failure of petitioner's counsel to articulate a theory of risk of incrimination on other charges is therefore a red herring in this case.

Here, the basis for petitioner's claim, as to additional offenses, was perfectly evident. In this case particularly, where the petitioner had pleaded "open" to all counts and there was no plea agreement, the government was free, if it wished, to prosecute her further for any number of other offenses, including particular transactions in furtherance of the same conspiracy that were the very basis for the "relevant conduct" determination. See *United*

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[17] Only a mere unexplained statement that the information sought would or could tend to incriminate the witness may be held insufficient. *Hoffman*, 341 U.S. at 486.

States v. Witte (Double Jeopardy Clause does not bar successive prosecution for offense that was accounted for as "relevant conduct" at sentencing in a prior case); *United States v. Felix*, 503 U.S. 378 (1992) (substantive crime and conspiracy to commit it are two different offenses).[18] Indeed, at the time of her sentencing, in July 1996, petitioner faced a "real and appreciable" risk[19] of further prosecution on many state or federal charges that might occur to an imaginative prosecutor wandering the pages of our over-criminalized statute books, all of which must necessarily have been evident to any judge evaluating her assertion of the privilege.

Indeed, if petitioner had no Fifth Amendment right to remain silent after pleading guilty, there would be little impediment to the government's choosing to seek additional charges in response to a defendant's refusal to provide information between plea and sentencing about her own conduct and that of others. Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978), with *Blackledge v. Perry*, 417 U.S. 21 (1974).

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[18] Her penalized silence concerned drug transactions other than the three which she admitted by pleading guilty to the substantive counts, but which were deemed "relevant conduct" under USSG § 1B1.3. To qualify as "relevant" any additional transaction had to consist of criminal conduct. *United States v. Dickler*, 64 F.3d 818, 830-31 (3d Cir. 1995). These transactions were also expressly treated as "involv[ed]" in her instant conspiracy offense so as to trigger a mandatory ten-year term under 21 U.S.C. § 841(b)(1)(A)(ii)(II).

[19] *Marchetti v. United States*, 390 U.S. 39, 48 (1968), quoting *Brown v. Walker*, 161 U.S. 591, 599 (1896) (in turn quoting British case law).

If a court is convinced that a question cannot possibly involve self-incrimination, the witness can be compelled to testify. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).[20] On the other hand, neither the absence of a current investigation or charge, nor informal assurances of police or prosecutorial authorities concerning a lack of present intention to prosecute, will suffice to overcome a claim of the privilege; it is enough that the defendant have reasonable cause to apprehend danger of prosecution as a result of the disclosures. *Hoffman*, 341 U.S. at 486. The casual dismissal of petitioner's claim by the court below stands in stark contrast to this Court's standard.[21]

For all these reasons, petitioner's reasonable apprehension of prosecution for additional offenses also justified her invocation of the Fifth Amendment privilege at

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[20] For example, the statute of limitations may have run on that offense, see *Balsys*, 118 S.Ct. at 2221 n.1, or the claimant may already enjoy double jeopardy protection from prosecution. In *Zicarelli*, the Court found that although the witness might reasonably fear a foreign prosecution generally, there was no logical connection between that risk and the questions he had refused to answer in New Jersey. But see *United States v. Balsys* (right against self-incrimination generally does not extend to concern with potential foreign prosecution).

[21] In none of this Court's cases is the existence of a current criminal investigation said to be a requirement for a Fifth Amendment claim. In fact, the cases say the opposite. See, *e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) ("answers that would incriminate him in a *pending or later* criminal prosecution") (emphasis added); *Maness v. Meyers*, 341 U.S. 479, 462 (1975).

sentencing, and therefore barred the district court from drawing an inference against her.

CONCLUSION

For the foregoing reasons, NACDL and FAMM urge this Court to correct the manifest constitutional error in the decision below. The Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to allow petitioner a resentencing.

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